(1)

No. 95-5661-CFY
Status: GRANTED

Title: Juan Melendez, Petitioner
v.
United States

Docketed:
August 15, 1995

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Mullin,Patrick

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 15 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 15 1995		Order extending time to file response to petition until October 20, 1995.
5	Sep 20 1995		Brief of respondent United States in opposition filed.
6	Oct 5 1995		DISTRIBUTED. October 27, 1995 (Page 4)
9	Oct 30 1995		REDISTRIBUTED. November 3, 1995 (Page 12)
11	Nov 6 1995		Petition GRANTED.
			**********
12	Dec 14 1995		SET FOR ARGUMENT TUESDAY, FEBRUARY 27, 1996. (2ND CASE).
14	Dec 18 1995		Order extending time to file brief of petitioner on the merits until December 29, 1995.
15	Dec 26 1995		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
16	Dec 26 1995		Brief amicus curiae of Association of Criminal Defense Lawyers in New Jersey filed.
17	Dec 29 1995		Joint appendix filed.
18	Dec 29 1995		Brief of petitioner Juan Melendez filed.
19	Jan 18 1996		CIRCULATED.
20	Jan 30 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Third Circuit.
21	Feb 1 1996		Record filed.
		*	Original record proceedings United States District Court for the District of New Jersey.
22	Feb 1 1996	X	Brief of respondent United States filed.
23	Feb 20 1996	X	Reply brief of petitioner Juan Melendez (TBP) filed.
24	Feb 20 1996	X	Reply brief of petitioner Juan melendez filed.
25	Feb 27 1996		ARGUED.

95-5661

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JUNE, 1996

JUAN MELENDEZ - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Patrick A. Mullin
Attorney for Petitioner
25 Main Street
Court Plaza North
Hackensack, NJ 07601
(201) 487-9282

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Juan Melendez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's denial of discretion to depart below the statutory mandatory minimum, upon the government's motion under U.S.S.G. §5K1.1, without a second government application under 18 U.S.C. §3553(e). Petitioner states that this Third Circuit ruling violates the Separation of Powers clause and the Due Process clause of the Fifth Amendment to the United States Constitution. This ruling furthers a split among the Circuit Courts on this issue which, given its constitutional dimensions,

requires the United States Supreme Court to resolve it.

QUESTIONS PRESENTED

1. Did the sentencing court have the discretion to depart below the applicable statutory minimum once the United States moved for departure under U.S.S.G. §5K1, without the requirement of a second government departure application under 18 U.S.C. 3553(e)?

OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States of America v. Juan Melendez, Appellant, Docket No. 93-5755 (3rd Cir. May 22, 1995), and appears in Appendix A to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on May 22, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

18 U.S.C. §3553(e)

21 U.S.C. §841

21 U.S.C. §846

28 U.S.C. §994(n)

STATEMENT OF THE CASE

The United States District Court, District of New Jersey, had jurisdiction pursuant to 18 U.S.C. §3231. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. §1291.

Petitioner, Juan Melendez, entered into a plea agreement with the government and pleaded guilty to conspiracy to distribute more than five kilograms of cocaine. The plea agreement contained a stipulation that the Sentencing Guideline level would be determined on the basis of more than 50 kilograms of cocaine. At sentencing, the government moved for a downward departure under §5K1.1 of the Guidelines in recognition of the petitioner's cooperation, but the government requested that the District Court not depart below the statutory minimum sentence of ten years' imprisonment. The Sentencing Court agreed that it did not have discretion to depart below the statutory minimum without a second government application under 18 U.S.C. 3553(e). The District Court then sentenced the petitioner to ten years. A Notice of Appeal was timely filed.

Petitioner argued on appeal that the sentencing court had the authority to depart below the minimum mandatory sentence, once the government had brought the departure application under U.S.S.G. §5K1.1. It was the government's continued position that 18 U.S.C. §3553(e) requires that the government bring a separate departure application before the sentencing court has

discretion to fashion a sentence below the applicable statutory minimum.

Oral argument was heard on this application. On May 22, 1995, the Third Circuit upheld the sentencing court's finding that it did not have authority to depart below the minimum mandatory sentence set by statute unless the government files a separate application under 18 U.S.C. §3553(e). This decision was based upon a literal reading of §3553(e), with the admonition that there is no specific statutory or guideline provision that specifically addresses this procedure.

A Petition for Rehearing and Suggestion for Rehearing En Banc was subsequently denied. Petitioner now seeks a Writ of Certiorari for review of this most important issue.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Certiorari should be granted for two reasons. Firstly, the issue raised upon appeal has caused a significant split among the Circuit Courts. The Second, Fifth, Seventh and Ninth Circuits have ruled in favor of petitioner's position that a second motion by the government is unnecessary under the statutory sentencing scheme. The Eighth Circuit, as well as the Third Circuit, have ruled otherwise.

Just as important, the Third Circuit's decision violates fundamental notions of due process and separation of powers.[1] The Due Process clause of the Fifth Amendment is violated by the deprivation of a neutral magistrate in deciding whether the defendant should be sentenced below the ten-year statutory minimum. The Separation of Powers clause is also violated by granting to the government unfettered discretion to deny a sentencing reduction where the defendant has given substantial assistance. In the process, the judicial function is absorbed into the powers enjoyed by the prosecution.

Given the Constitutional dimension of this issue, the United States Sentencing Commission lacks authority to address it. The only forum where it can properly be addressed is before the United States Supreme Court.

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[1] This issue was not raised before the Third Circuit, although it was addressed in a similar case before the Second Circuit in United States v. Cheng Ah-Kai, 951 F.2d 490 (2nd Cir. 1991).

I. THE SPLIT AMONG THE CIRCUIT COURTS REQUIRES THE UNITED STATES SUPREME COURT TO REVIEW THIS ISSUE.

There are two statutory provisions and one Guideline provisions which were misinterpreted by the panel majority in denying Melendez's appeal. Section 3553(e) grants to the Court the authority to impose a sentence below the applicable statutory minimum sentence "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 3553(e) refers to §994 which, in subsection (n), authorizes a sentence below the applicable statutory minimum where a defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense. Neither of these provisions indicate whether a separate application must be made by the government in order for the Court to sentence below the applicable minimum. The third provision, U.S.S.G. §5K1.1, provides for a departure from the applicable Guidelines where a defendant provides substantial assistance. Incorrectly, the Third Circuit read these provisions as requiring a separate government application for departure below the applicable statutory minimum.

Though the Third Circuit misread these provisions in Melendez, other Circuit Courts have not fallen into this literal translation trap. The Ninth Circuit examined in United States v. Keene, 933 F.2d 711 (9th Cir. 1991), the relationship between §3553(e) and §994 and U.S.S.G. §5K1.1. Though there is no legislative history nor anything in the language of the

applicable statutes that Congress intended to give the government the authority to set the parameters for exercising the Court's sentencing discretion once a §5K1.1 application was made, the Court analyzed the relationship between §3553(e), §994(n) and the applicable Guideline sections and concluded that §5K1.1 does not create a separate grounds for a motion for reduction, but rather, triggers the Court's authority to downward depart below any statutory minimum.

The Second Circuit in United States v. Cheng Ah-Kai, 951 F.2d 490 (2nd Cir. 1991), came to the same conclusion on this issue. In Ah-Kai, the defendant pled guilty to the importation of more than one kilogram of heroin in violation of 21 U.S.C. §952(A) and §960(b)(1)(A). Under the Sentencing Guidelines, he faced a sentencing range of between 151-188 months' incarceration. A ten-year mandatory minimum also applied.

Ah-Kai cooperated with the government. As part of a plea agreement, the government agreed to move for a downward departure from the Sentencing Guidelines, making no reference made to the statutory minimum ten-year sentence. In fact, the government specifically noted at sentencing that it was moving based upon U.S.S.G. §5K1.1 and not moving for any departure from the statutory minimum under §3553.

In its well-reasoned opinion, the Second Circuit obviated any distinction between these two statutes for sentencing purposes. The Court found §994(n) and U.S.S.G. §5K1.1 do not create a separate ground for a reduction motion below the

Guidelines, exclusive of §3553. Adopting the Keene rationale, the Second Circuit found that §5K1.1 implements the directive of both §994(n) and §3553(e) and that all three provisions should be read in concert to determine the appropriateness and extent of any departure. The Court further ruled that once the government had brought an application for departure under §5K1.1 based upon a defendant's cooperation, then it has discretion unfettered by any additional government application, to depart below the applicable statutory minimum.

The Ah-Kai Court relied upon several factors in entering into its decision, including: (1) Application Note 1 to U.S.S.G. §5K1.1 creating a conduit through which §3553(e) applies to all departure applications by the government related to a defendant's cooperation; (2) the requirement under both §5K1.1 and §3553(e) that a showing of substantial assistance be made before there can be a departure from the Sentencing Guidelines or from the statutory minimum; (3) the Sentencing Commission's reference to §5K1.1 government's departures below the statutory minimum and cases involving U.S.S.G. §2D1.1; (4) a proper distribution of the sentencing authority wherein the government is in the best position to initiate a departure application where substantial assistance has been rendered and the Court, exercising its discretion, is in the best position to decide departure.

The Fifth Circuit's ruling in United States v. Beckett, 996 F.2d 70 (5th Cir. 1993) mirrors the Keene and Ah-Kai decisions.

After dismissing the Eighth Circuit's ruling in United States v. Rodrigues-Morales, 958 F.2d 1441 (8th Cir. 1992), as simply a "literal reading" of the applicable statutory and Guideline provisions, the Beckett Court found the analysis of Ah-Kai and Keene more persuasive. At 74. The Court noted the substantial cross-referencing between §5K1.1, §3553(e) and §994(n) and concluded that their relationship made §5K1.1 the "appropriate vehicle" for the implementation of §3553(e). From a policy standpoint, it noted that the delicate balance between the government and the sentencing judge's authority is maintained under this analysis. Nor did it find any contrary provisions which limited the scope of the Court's sentencing authority once a §5K1.1 motion is filed.[2]

In the instant matter, the Third Circuit wrongly decided that the Court did not have authority to depart below the ten-year statutory minimum because the government did not expressly make a second application for departure. Petitioner submits that this interpretation of the applicable statutes is incorrect. The Supreme Court should grant certiorari since clarification of the District Court's authority under §5K1.1 is essential to heal the split among the Circuit Courts since, given the constitutional magnitude of this issue, the United States and Sentencing Commission are not in a position to resolve this most important issue.

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[2] The Seventh Circuit in United States v. Wills, 35 F.3d 1192 (7th Cir. 1992) has also concluded that a separate application is not necessary.

II. THE THIRD CIRCUIT'S DECISION VIOLATES DUE PROCESS AND ENCROACHES UPON JUDICIAL AUTHORITY.

Grave constitutional problems arise when the prosecutor is given the authority to sentence offenders or unilaterally to make Guideline decisions for their sentencing. Mistretta v. United States, 109 S.Ct. 647, 664 Note 17 (1989). The Court has recognized that at sentencing a defendant has a liberty interest in "avoiding future incarceration." United States v. Vizciano, 870 F.2d 52, 56 (2nd Cir. 1989). Thus, a defendant is entitled to procedural due process in sentencing. This requirement of due process limits Congress's authority to delegate to the prosecutor the job of finding the facts and making the judgment that the legislature deems relevant to sentencing.

In the instant matter, the prosecutor has recognized the defendant's "substantial assistance" by moving for a downward departure under §5K1.1. Yet, despite this recognition, the Court of Appeals has found that the Court lacks the power to depart below the statutory minimum unless the prosecutor makes a separate motion under §3553(e). As a result, the prosecutor, rather than the judge, has the real discretion of deciding the scope of sentencing under a substantial assistance motion. Granting the prosecutor this broad power violates the Due Process clause as well as the Separate of Powers clause of the United States Constitution.

The process due a criminal defendant includes, except in narrowly limited situations, evaluation of sentencing factors by a neutral and independent judge rather than by the accusing

officer. The reasons for this are deeply rooted in our system of government and in the Constitution. As the Supreme Court has written in another context, "prosecutors...simply cannot be asked to maintain the requisite neutrality with regard to their own investigations--the 'competitive enterprise' that must rightly engage their single-minded attention." Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971). The Court has thus held that those who perform prosecutorial functions cannot, in the very same case, be assigned judicial functions. Id. at 450-51 (prosecutor cannot perform magistrate's function of issuing search warrant); In re Murchison, 349 U.S. 133, 134, 137-39 (1955) (trial of case by judge who sat as sole grand juror, a prosecutorial function, violated due process; deprivation of "impartial tribunal"). Just as an officer who "was part of the accusatory process...'cannot be, in the very nature of things, wholly disinterested in the conviction and acquittal of those accused,'" Mayberry v. Pennsylvania, 400 U.S. 455, 505 (1971), citing In re Murchison, 349 U.S. at 137, he cannot be wholly disinterested in the question of sentence. And a defendant is, without doubt, entitled to be sentenced by an impartial and disinterested magistrate. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968). Allowing the prosecutor (rather than a judge) the complete discretion to decide the scope of a "substantial assistance" motion, once it has been made, deprives the sentencing proceeding of "the appearance of evenhanded justice which is at the core of due process." Mayberry v. Pennsylvania,

400 U.S. at 469 (Harlan, J., concurring).

If §5K1.1 is constitutional at all, a matter about which serious doubts have recently been expressed, it is primarily for two reasons: the sentencing power given the prosecution is the narrow one of determining whether there has been substantial assistance, and the question of whether there has been substantial assistance is one that the prosecution is uniquely suited to answer. It is on these bases that virtually every Circuit to have considered the question has upheld the constitutionality of §5K1.1.

Once a prosecutor has formally made a motion to the court certifying that he has found "substantial assistance" on the part of a defendant, however, these rationales disappear. The prosecutor has at that point carried out the "narrow" function assigned him under the Guidelines. He has, moreover, certified to the court the result of his performance of the function he is uniquely suited to serve by indicating that "substantial assistance" was in fact given by the defendant. The grant of further authority to the prosecutor to limit the trial court's discretion in acting on the prosecutor's own conclusion is essentially irrational and constitutes a raw shift of power from the judicial to the executive. This unbridled power to limit sentencing options is conferred not on a neutral magistrate, but on the very person who investigated the case, initiated charges, and prosecuted the trial.

It is highly significant in this respect that once a

defendant's "substantial assistance" has been certified to the court, any further power of the prosecutor to circumscribe the court's discretion lacks any standard for its exercise. Under §5K1.1, the function of the prosecutor is to determine whether or not there is substantial assistance, and the meaning of this phrase is fairly clear and subject to more or less uniform application. Once the existence of this assistance has been ascertained, however, there are no standards, statutory or otherwise, to guide the prosecutor's discretion in deciding whether to recommend a departure below the statutory minimum as well as a departure below the guidelines. It is no longer the prosecutor's job to evaluate the quality or ultimate effect of the assistance. At this point, therefore, the government may make its decision to deny a further sentence reduction on any factor it chooses. This broad, unreviewable, and standardless discretion to affect a sentence, and to deprive the sentencing court of the ability to consider facts before it, violates the Due Process Clause of the Fifth Amendment.

For essentially these same reasons, the government's construction of these provisions would violate the Separation of Powers clause. It would constitute a clear encroachment on judicial authority, for it would remove from the district court the power to grant some relief under a substantial assistance motion.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued to review the judgment and opinion of the Third Circuit Court of Appeals in this matter.

Respectfully submitted,

Dated: August 11, 1995

Patrick A. Mullin
Attorney for Petitioner
Juan Melendez

Filed May 22, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ
Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. Action No. 92-cr-00713-2)

Argued February 16, 1995

BEFORE: STAPLETON and COWEN, *Circuit Judges*, and HUYETT, *District Judge**

(Opinion Filed May 22, 1995)

Patrick A. Mullin (Argued)
25 Main Street
Court Plaza North
Hackensack, N.J. 97601
Attorney for Appellant

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*Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

EXHIBIT A

Faith S. Hochberg
United States Attorney
Victor Ashrafi (Argued)
Chief, Appeals Division
970 Broad Street
Newark, N.J. 07102
Attorneys for Appellee

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Juan Melendez appeals his sentence. The first issue presented concerns a district court's authority to depart downward from a statutory minimum sentence based upon the defendant's substantial assistance with a criminal investigation where the government has moved under USSG §5K1.1 for a departure below the U.S. Sentencing Guideline range but has not moved under 18 U.S.C. § 3553(e) for a departure below the statutory minimum. We hold that, under such circumstances, a district court's authority under §5K1.1 to depart below the Sentencing Guideline range does not permit it to depart below a lower minimum sentence set by statute. The second issue concerns Melendez's motion for a downward departure pursuant to application note 17 to USSG §2D1.1. We agree with the district court that §2D1.1 application note 17 does not permit a district court to depart downward from a statutory minimum sentence. The final issue concerns Melendez's contention that the district court should have permitted him to withdraw his guilty plea. The record establishes that Melendez in fact did not attempt to withdraw his plea before the district court.

I.

Melendez and codefendant Edwin Moya were approached by confidential informants of the United States Customs Service posing as importers and transporters of cocaine. This initial contact led to several meetings, during which Melendez, Moya, and the confidential informants discussed

the availability of cocaine for distribution. The discussions culminated in a meeting during which Melendez and Moya gave the confidential informants $10,000 as a deposit toward the transportation expenses for 24 kilograms of cocaine. The next day, the two codefendants deposited an additional $2500 for the transportation of the cocaine.

Shortly thereafter, Moya and Melendez were arrested by New York authorities on unrelated drug charges. After their arrest, Moya's common law wife, Anna Maria Ferrara, her brother Raphael Ferrara, and her uncle Bienvenido Polanco, held further negotiations with the confidential informants for a 225-kilogram cocaine purchase. Government agents ultimately made a controlled delivery of 30 kilograms of cocaine to Raphael Ferrara and Polanco. Raphael Ferrara and Polanco were arrested shortly after taking possession of the drugs and Anna Maria Ferrara was arrested on the following day.

Melendez was charged with conspiring, in violation of 21 U.S.C. § 846, to distribute and to possess with intent to distribute more than five kilograms of cocaine, a crime that carries a statutory minimum sentence of 10 years' imprisonment. 21 U.S.C. § 841(b)(1)(A). He originally pleaded not guilty. Plea negotiations ensued, however, and Melendez ultimately signed a cooperating plea agreement. The agreement provided, in pertinent part, that in return for Melendez's cooperation with the government's investigation and his pleading guilty, the government would move for a downward departure from the applicable Guideline range pursuant to USSG §5K1.1. The agreement did not require the government to file a § 3553(e) motion to depart below the statutory minimum, however. Melendez retracted his plea of not guilty and pleaded guilty to the charged conspiracy.

The probation officer determined that the Guideline sentencing range applicable to Melendez's crime was 135 to 168 months. The government, in accordance with the agreement, moved for a downward departure from that Guideline range, pursuant to §5K1.1, in recognition of Melendez's substantial assistance in the investigation or prosecution of another person. The district judge granted that motion, and departed downward from the sentencing

range set by the Guidelines. However, because the government had not also moved pursuant to § 3553(e), the judge ruled that he had no authority to depart below the statutory minimum and meted out the 10-year minimum sentence required by statute. Melendez maintains that this was error. He argues that a §5K1.1 motion not only triggers the court's authority to depart downward from the sentencing level set by the Guidelines but also triggers the court's authority to depart below a lower, statutory minimum.

II.

The government maintains that Melendez waived or forfeited his right to appeal this issue, claiming that Melendez never formally argued to the district court that the government's §5K1.1 departure motion empowered the court to depart below the 10-year statutory minimum. To preserve the right to appeal a district court ruling, "it is sufficient that a party, at the time the ruling . . . is made or sought, makes known to the court the action which that party desires the court to take . . . and the grounds therefor." Fed. R. Crim. P. 51. Moreover, "[t]he general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance." 3A Charles A. Wright, *Federal Practice & Procedure* § 842, 289-90 (1982 & Supp. 1994); *see also Government of Virgin Islands v. Joseph*, 964 F.2d 1380, 1384-85 (3d Cir. 1992) (rejecting the government's contention that an issue was not preserved for appeal because the court had been made aware of the issue and because a contemporaneous objection would not have further aided the district court); *cf. United States v. 57.09 Acres of Land*, 757 F.2d 1025, 1027 (9th Cir. 1985) (noting that the government did not waive its right to object to jury instructions because the court had been made "aware of the government's objection"); *Bass v. Department of Agriculture*, 737 F.2d 1408, 1413 (5th Cir. 1984) (noting the established rule in civil cases "that formal objection is not

necessary if the trial judge was fairly apprised of the nature of the objection").

Our review of the record reveals that Melendez in fact "[made] known to the court the action which [he] desire[d] the court to take." As the Assistant United States Attorney admitted during the sentencing hearing: "Both defendants through counsel have argued that the Court depart downward from this mandatory minimum." (App. at 24a.) Moreover, the district court was made well aware of the underlying legal debate over whether a §5K1.1 motion permits a district court to depart below a statutory minimum. The government admitted during the sentencing hearing that "[s]ome arguments indicate that the law doesn't require the Court to impose the mandatory minimum." (App. at 24a.) Most importantly, the district court clearly understood that Melendez was asserting these arguments; it expressly addressed and resolved the issue of the court's authority to depart below the statutory minimum. In this context, there was no need for Melendez to take the additional step of repackaging the government's statement as his own formal objection to preserve his right to appeal. Any such requirement would elevate form over substance. Thus, we conclude that this issue is properly preserved for appeal and we will proceed to the merits of Melendez's argument.

III.

Congress has decreed that a person who distributes, or conspires to distribute, five kilograms or more of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years." 21 U.S.C. §841(b)(1)(A). This statute represents a Congressional judgment about the seriousness of this offense and the degree of sanction necessary to punish and deter this kind of conduct.

At the same time, Congress has recognized that the value to society of the cooperation of an individual charged with this kind of offense can, under some circumstances, outweigh the benefit to be derived from imposing the statutory minimum sentence. Accordingly, Congress has authorized sentences below this and other statutory minima. Section 3553(e) of Title 18 provides:

> **(e) Limited authority to impose a sentence below a statutory minimum. — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.**

Notably, Congress has authorized sentences below a statutory minimum only upon a prosecution's motion; that is, before a court may depart below a statutory minimum, the prosecutor first must determine that the value of the cooperation is sufficiently great to warrant overriding Congress's judgment concerning the minimum appropriate sentence. By requiring a government motion, Congress thus gave the prosecutor the sole key that affords access to a sentence below a statutory minimum. *Wade v. United States*, 112 S. Ct. 1840, 1843 (1992).

That the prosecutor holds the sole key to the area below the statutory minimum does not mean that the sentencing court, once the prosecutor has made a §3553(e) motion, has unbridled discretion to set a defendant's sentence, however. As the final sentence of §3553(e) reflects, Congress contemplated that the limited downward departure authority there bestowed on a sentencing court would be exercised in the context of, and in a manner consistent with, a system of Guidelines sentencing that was being constructed at the time of the passage of §3553(e). Consistent with this approach, section 994(n) of Title 28 of the Sentencing Reform Act of 1984 directs the Sentencing Commission to formulate Guidelines that will reflect the general appropriateness of rewarding cooperation with sentences lower than they would otherwise be, including sentences below a statutory minimum. Section 994(n) of Title 28 provides in pertinent part:

> The [Sentencing] Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be

> imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Although § 994(n) directs recognition of the principle that a lower sentence for cooperation can be appropriate, it says nothing about a process for identifying particular cases in which such a sentence may be appropriate. Accordingly, nothing in the text of § 994(n) suggests that Congress intended by the passage of § 994(n) to take back the access key given to the prosecutor in § 3553(e). The same can be said for the legislative history of § 994(n). The most one can argue, from Melendez's perspective, is that § 994(n) *may authorize the Commission* to take back that key. The text of § 994(n) does not seem to us to require that reading, however, and the legislative history provides no evidence of such an intent on the part of Congress.

Under § 994(n), the principle that a lower sentence for cooperation may be appropriate applies as well to sentences established by the Guidelines. Here also § 994(n) says nothing about how particular cases appropriate for such sentences will be identified. Thus, nothing in § 994(n) requires the Commission to give the prosecutor an exclusive access key to sentences *below the Guideline range* in return for cooperation.

The Commission exercised the authority given to it in this area by promulgating USSG §5K1.1. That Guideline and its first application note provide in relevant part:

> **§5K1.1. *Substantial Assistance to Authorities (Policy Statement)***
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> * * * *

> *Application Notes:*
>
> 1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

There are two things about this action of the Commission that seem to us important in the current context. The first is that the sole authority granted in §5K1.1 is for departures "from the guidelines." Given the express reference in the application note to statutes authorizing departures "below a statutorily required minimum sentence," we believe this limitation must represent an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e).[1]

Second, §5K1.1 reflects a policy decision *on the part of the Commission* to give the prosecutor a veto power over departures below the Guideline range based on cooperation. The Commission thus recognized the value of letting the prosecutor's discretion control access to the area between the applicable Guideline range and any applicable, lower statutory minimum, just as § 3553(e) allows that discretion to control access to the area below a statutory minimum.

With this background, we turn to Melendez's argument. He must first ask us to conclude that Congress in § 944(n) authorized the Commission to take back the access key granted to the prosecutor in § 3553(e). While we question this proposition, we may accept it *arguendo* here. Melendez next insists that the Commission, while recognizing the value of allowing the prosecutor to control access to departures for cooperation below the Guideline range,

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1. Where a statutory minimum is above the Guideline range, it becomes "the guideline sentence." USSG §5G1.1(b). We do not suggest that two motions are required in such circumstances. A motion under either § 3553(e) or §5K1.1 will suffice to demonstrate that the requisite exercise of prosecutorial discretion has occurred.

created a system under which he or she can grant access to the area between the Guideline range and a lower statutory minimum only by surrendering his or her access control to the area below the statutory minimum. Melendez tenders no persuasive reason, however, why the Commission might have chosen to create such a seemingly incongruent system.

The root issue for decision here is whether the prosecutor in a given case will be able to grant access to a Guideline departure for cooperation and at the same time retain control of access to a departure from a lower, statutory minimum. A literal reading of §5K1.1 would indicate that a prosecutor has this option. This conclusion is consistent as well with the Congressional judgment reflected in § 3553(e). Moreover, no policy considerations appear to counsel against this conclusion and a number counsel in favor. Indeed, beyond this case, a denial of this option for the prosecution would appear to be in no one's best interest. As Judge Easterbrook observed in his dissent in *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994):

> Section 3553(e) and Guideline 5K1.1 permit a prosecutor to offer a reward for assistance. This process works best if the amount of the reward can be graduated to the value of the assistance — a value the prosecutor (who sees the full menu of crimes and potential cases in the district) can assess better than a judge. . . . [H]olding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate [will curtail] the prosecutor's ability to match the reward to the assistance. When cooperation can be procured for a modest reduction, a lower sentence overcompensates the defendant, at the expense of the deterrence force of the criminal law. Another consequence is that there will be fewer motions of any kind. If filing a motion under § 5K1.1 permits the judge to cut the sentence by three-quarters (as happened here), the prosecutor will insist on a great deal of assistance. Many defendants are unlucky enough to have little of value to offer. . . . They are now condemned to serve the full authorized sentence, even though a prosecutor possessed of power to differentiate might reward slight aid with a slight reduction.

We hold that a motion under USSG §5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum.[2]

IV.

Melendez next argues that the government's confidential informants offered to sell him cocaine at prices substantially below market price, thereby leading him to purchase a significantly greater quantity of cocaine than he ordinarily would have been able to purchase given his available funds. He maintains further that the $12,500 he had available for the drug deal would have enabled him to purchase, on the open market, only between one-half and three-quarters of a kilogram of cocaine instead of the more than 50 kilograms attributed to him by the district court. These facts, he contends, mandate a downward departure under Application Note 17 to USSG §2D1.1.[3]

Melendez is not in a position to make these arguments, however. In his plea agreement, he specifically stipulated

---

2. In so concluding, we join the Court of Appeals for the Eighth Circuit. *United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir. 1992). We respectfully disagree with the other courts of appeals that have addressed the same issue. *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). We note our accord with the thoughtful dissents in *Wills* and *Keene*.

3. Application Note 17 states:

> If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

that his applicable Guideline range was 50 kilograms to 150 kilograms of cocaine. Moreover, the probation report determined that the applicable quantity of cocaine to be 75 kilograms and neither Melendez's objections to the presentence report nor his sentencing letter to the district court requested that less than five kilograms should be attributed to him. We accordingly conclude that the district court properly attributed more than five kilograms of cocaine to Melendez.

Having determined that the district court properly attributed in excess of five kilograms of cocaine to Melendez, the district court then was constrained to impose the statutory minimum sentence of 10 years' imprisonment. *See, e.g., United States v. DeMaio*, 28 F.3d 588, 591 (7th Cir. 1994) (holding that a sentencing court may not depart below a statutory minimum on any ground other than substantial assistance to criminal investigation); *United States v. Rudolph*, 970 F.2d 467, 470 (8th Cir. 1992) (holding that defendant's diminished capacity, while grounds for departure from the Guidelines sentencing range, is not grounds for departure below the minimum sentence set by Congress), *cert. denied*, 113 S. Ct. 1023 (1993); *United States v. Valente*, 961 F.2d 133, 135 (9th Cir. 1992) (holding that defendant's aberrant behavior will not justify a departure below a statutory minimum).

V.

Finally, Melendez argues that the district court should have given him an opportunity to withdraw his guilty plea once he learned that the government did not intend to recommend a sentence below the 10-year statutory minimum. This issue also was not properly preserved for appeal. Although Melendez, in a brief filed *pro se*, maintains that he expressed his desire to withdraw his plea both in conversations with his attorney and in a letter to the court, nothing in the docket sheet or the record before this court supports those claims. Moreover, Melendez failed to express his alleged desire to withdraw his plea when he addressed the court at his sentencing. Because Melendez failed to raise this issue before the district court, we cannot address it here. *See, e.g., United States v. Johnson*, 359

F.2d 845, 846 (3d Cir. 1966) (noting that questions cannot be presented on appeal that have not first been determined by the district court).

VI.

We will affirm the judgment of the district court.

HUYETT, District Judge, dissenting:

I join in Parts I, II, and V of the majority opinion, and respectfully dissent with respect to Parts III, IV, and VI. Although the issue is a close one, I believe the majority has erred in holding that when a sentencing court grants a USSG § 5K1.1 motion to depart below the guideline sentence, the court may not impose a sentence below the statutory minimum unless the § 5K1.1 motion is accompanied by a motion under 18 U.S.C. § 3553(e). I believe the court should follow the position accepted in the majority of circuits that have considered this issue. *See United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). *But see United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 375, 121 L. Ed.2d 287 (1992).

The majority correctly reasons that 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) are silent with respect to whether the prosecutor should be given exclusive access to sentences below the Guideline ranges. I believe the majority errs, however, in determining that § 5K1.1 reflects the Sentencing Commission's advertent decision to give the prosecutor a veto over departures below the Guideline ranges and to leave departures below the statutory minima to the authority conferred by § 3553(e).

A careful reading of the sentencing guidelines and its commentary leads to an opposite conclusion. Guideline commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, ___ U.S. ___, ___, 113 S. Ct. 1913, 1915, 123 L. Ed.2d 598 (1993). With this direction in mind, I believe the court should give more careful consideration to the commentary to the guidelines.

Section 5K1.1 must be read together with application note 1 which reads:

> Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

USSG § 5K1.1 comment. (n.1). I believe this note expresses the Sentencing Commission's intent that § 5K1.1 serve as a "conduit" for the application of § 3553(e), *see Cheng Ah-Kai*, 951 F.2d at 493, and not an attempt to create two separate motions concerning substantial assistance. Application Note 7 to USSG § 2D1.1, the guideline concerning drug offenses, further supports this interpretation and reads as follows:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* § 5K1.1 (Substantial Assistance to Authorities).

USSG § 2D1.1 comment. (n.7). The reference to § 5K1.1 rather than to § 3553(e) illustrates the Commission's determination that departures from the statutory minimum sentence are a mere subset of departures from the guidelines. This cross referencing, along with the substantial cross referencing between § 5K1.1, § 3553(e), and § 994(n) supports the conclusion that the district court has discretion. *See Keene*, 933 F.2d at 714.

I also disagree with the majority's view that "no policy considerations appear to counsel against this conclusion and a number counsel in favor" of its conclusion. Majority Op. at 9. Other circuits have ably raised policy considerations that counsel against the majority's position. The Ninth Circuit, for example, reasoned that with regard to the powers conferred on the government by § 5K1.1 and § 3553(e), "[o]nce the motion is made by the government, a transfer of discretion regarding the range of departure

could well frustrate Congress' goal of eliminating sentencing disparity given the absence of appellate review over the prosecutor's activity." *Keene*, 933 F.2d at 715. In addition, an interpretation that provides two separate and distinct types of departure "would lead to a usurpation of the discretion of the district court." *Cheng Ah-Kai*, 951 F.2d at 494.

Although permitting the judge to depart below the guidelines or the statutory minimum on the basis of a § 3553(e) or § 5K1.1 motion curtails the prosecutor's ability to match the reward to the assistance, the defendant's sentence will still reflect his cooperation. Judges are quite capable of making this determination and should be permitted to exercise their sound discretion. *See id.*; *Keene*, 933 F.2d at 714.

I would vacate the sentence imposed by the district court and remand this case for resentencing. Therefore, I dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ORIGINAL

No. 95-5661

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JUAN MELENDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WAN J. KIM
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court had authority to sentence petitioner below the mandatory minimum sentence prescribed by the statute under which petitioner was convicted, when the government filed a motion under Sentencing Guidelines § 5K1.1 for a downward departure from the applicable Guidelines sentencing range, but refrained from filing a motion under 18 U.S.C. 3553(e) for a departure below the statutory minimum sentence.

IN THE SUPREME COURT OF THE UNITED STATES

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JUAN MELENDEZ, PETITIONER

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 55 F.3d 130.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. A petition for rehearing was denied on June 27, 1995. The petition for writ of certiorari was filed on August 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of New Jersey to conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846.

He was sentenced to the mandatory minimum sentence of 120 months' imprisonment prescribed for such violations by 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993), to be followed by five years' supervised release. The court of appeals affirmed. Pet. 1-15.

1. On June 23, 1993, petitioner pleaded guilty to conspiring to possess cocaine with the intent to distribute it. Gov't C.A. Br. 4. The plea stemmed from his role in attempting to purchase a large quantity of cocaine from confidential informants of the United States Customs Service. Pet. App. 2. Petitioner's plea agreement provided that the government would file a motion under Sentencing Guidelines § 5K1.1 for a downward departure from the sentence dictated by the Sentencing Guidelines if he produced substantial information about drug trafficking activities. Id. at 3.[1] In contrast, the government did not agree to file a separate motion under 18 U.S.C. 3553(e) for a departure below the ten-year mandatory minimum sentence prescribed by 21 U.S.C. 841(b)(1)(A).[2]

---

[1] Sentencing Guidelines § 5K1.1 provides in relevant part:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

[2] 18 U.S.C. 3553(e) provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Ibid. The plea agreement stipulated that the applicable range under Guidelines § 2D1.1(4) would be determined on the basis of 50 to 150 kilograms of cocaine. Gov't C.A. Br. 4. Coupled with an offense level of 33 and a criminal history category of I, the Presentence Report calculated a Guidelines range of 135 to 168 months' imprisonment. Pet. App. 3; Presentence Report ¶ 65.

Petitioner provided substantial assistance to the government, and, in accordance with the plea agreement, the government filed a motion under Guidelines § 5K1.1. Pet. App. 3. After granting the motion, the district court departed downward from the Guidelines range by sentencing petitioner to the statutory mandatory minimum sentence of 120 months' imprisonment. Id. at 4. The court held that, in the absence of a separate government motion under 18 U.S.C. 3553(e), it could not depart below the statutory minimum sentence. Ibid.

2. The court of appeals affirmed. Pet. App. 1-15. In relevant part, it held that "a motion under [Sentencing Guidelines] §5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum." Pet. App. 10.[3] The court determined that Congress and the Sentencing Commission intended to give the prosecutor the discretion to allow a court to depart below the Guidelines range, without allowing it to depart below a lower statutory minimum sentence. Id. at 6-9.

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[3] Judge Huyett dissented from that holding. Pet. App. 13-15.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the district court had authority to depart below the mandatory minimum sentence prescribed by statute for the offense of which he was convicted, even though the government did not move for such a departure under 18 U.S.C. 3553(e). The court of appeals correctly rejected that contention. This Court has declined further review of the issue on numerous prior occasions. See United States v. Sanchez, 32 F.3d 1330 (8th Cir. 1994), cert. denied, 115 S. Ct. 1119 (1995); United States v. Womack, 985 F.2d 395, 399-400 (8th Cir.), cert. denied, 114 S. Ct. 276 (1993); United States v. Durham, 963 F.2d 185, 187 (8th Cir.), cert. denied, 113 S. Ct. 662 (1992); United States v. Rodriguez-Morales, 958 F.2d 1441, 1447 (8th Cir.), cert. denied, 113 S. Ct. 375 (1992). There is no reason for a different result here.

Section 5K1.1 provides that, "[u]pon motion of the government * * * the court may depart from the guidelines." (Emphasis added.) Section 5K1.1 does not refer to a departure from statutory mandatory minimum sentences. The commentary to Section 5K1.1, however, states that a departure below a mandatory minimum sentence may be justified "[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." One of the circumstances set forth in 18 U.S.C. 3553(e) for a departure below the statutory minimum sentence is a motion by the government for such a departure. Consequently, where, as here, the government does not

file a motion to depart below the statutory minimum, the district court lacks authority to grant such a departure.

As the court of appeals recognized, Section 3553(e) of Title 18 and Section 5K1.1 of the Guidelines are distinct provisions that serve different purposes. See Pet. App. 5-8. The prosecutor may reasonably determine, based on an evaluation of the seriousness of the defendant's crime and the value of his cooperation, that the defendant's assistance warrants a motion under Section 5K1.1 for departure below the Guidelines range, but not a motion under 18 U.S.C. 3553(e) for a further reduction below the statutory minimum sentence. See Pet. App. 9. Petitioner does not provide any basis for reviewing that determination in this case. See generally Wade v. United States, 504 U.S. 181, 185-186 (1992) (prosecutor has broad discretion to decide whether to file a substantial assistance motion, subject only to constitutional limitations).

The Third Circuit's decision in this case accords with the Eighth Circuit's decision in United States v. Rodriguez-Morales, supra. See Pet. App. 10 n.2. As petitioner (Pet. 8-11 and 11 n.2) and the dissent below (Pet. App. 13) pointed out, however, those decisions conflict with decisions in four other circuits. See United States v. Wills, 35 F.3d 1192, 1194-1195 (7th Cir. 1994); United States v. Beckett, 996 F.2d 70, 75 (5th Cir. 1993); United States v. Cheng Ah-Kai, 951 F.2d 490, 492-493 (2d Cir. 1991); United States v. Keene, 933 F.2d 711, 712 (9th Cir. 1991). The latter courts have held that a motion by the government under

Guidelines § 5K1.1 authorizes a sentencing court to depart below both the Guidelines range and the statutory minimum sentence.

The conflict nevertheless does not merit review by the Court, because the Sentencing Commission has authority to promulgate guidelines that address the proper response by a court when the government moves for departure below an applicable sentence based on substantial assistance. See 28 U.S.C. 994(n) ("The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence * * *."); 18 U.S.C. 3553(e) ("a sentence below a level established by statute as minimum sentence * * * shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28"). Accordingly, because the Commission may resolve the issue on which the courts of appeals have disagreed, review by this Court is unnecessary. See Braxton v. United States, 500 U.S. 344, 348 (1991) (because Congress contemplated that Sentencing Commission would periodically "make whatever clarifying revisions of the Guidelines conflicting judicial decisions might suggest," this Court will be "more restrained and circumspect" in granting review to resolve such conflicts).[4]

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[4] Some decisions suggest that Congress did not intend to permit the government to limit a court's sentencing discretion, once the government files a motion for a departure based on substantial assistance. See Beckett, 996 F.2d at 75; Keene, 933 F.2d at 714; compare Wills, 35 F.2d at 1195-1196 (deferring to what the court understood to be the Commission's interpretation of the statute). The statute does not explicitly address that issue, however, and the Commission would thus have authority either (1) to require a motion under Section 3553(e) as a precondition to a departure from the applicable Guidelines sentencing range, or (2) to provide that departures from the statutory minimum and the Guidelines range require separate motions.

We also note that a provision in a bill introduced in the Senate would resolve the issue. See Section 735 of S.3, 104th Cong., 1st Sess. (1995), reprinted in 141 Cong. Rec. S90 (daily ed. Jan. 4, 1995) ("Section 994(n) of title 28, United States Code, is amended by adding the following at the end thereof: 'The power to reduce a sentence under this section authorizes a court to impose a sentence that is below a level established by statute as a minimum sentence only on motion of the government specifically seeking reduction below such level.'").

2. Petitioner also contends (Pet. 12-15) that the requirement that the government file a motion under 18 U.S.C. 3553(e) in order for the district court to impose a sentence below the statutory minimum violates the Due Process Clause and separation-of-powers principles. Those violations arise, according to petitioner, because "the prosecutor, rather than the judge, has the real discretion of deciding the scope of sentencing under a substantial assistance motion." Pet. 12. The result of a prosecutor's decision not to file a motion under Section 3553(e), however, is simply that the sentencing court must adhere to the mandatory minimum sentence that Congress prescribed. Accordingly, the lower courts have uniformly rejected the improper-delegation argument that petitioner asserts here and similar constitutional challenges.[5] In Wade, the Court made clear that, "in both

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[5] See United States v. Kuntz, 908 F.2d 655, 657-658 (10th Cir. 1990) (rejecting due process and separation-of-powers arguments, characterizing latter as "variant" of former); United States v. Huerta, 878 F.2d 89, 91-94 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990) (due process and separation of powers); United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989) (same), cert. denied, 493 U.S. 1047 (1990); United States v. Musser, 856 F.2d

§ 3553(e) and § 5K1.1, the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted." 504 U.S. at 185. If the decision whether to seek any reduction in the defendant's sentence based on his cooperation with the government may validly be committed to the prosecutor's discretion, the prosecutor may also exercise the narrower discretion to decide whether to request a sentence below the statutory minimum without exceeding the executive's permissible role in sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WAN J. KIM
Attorney

SEPTEMBER 1995

1484, 1487 (11th Cir. 1988) (separation of powers, equal protection, and due process), cert. denied, 489 U.S. 1022 (1989); see also United States v. Doe, 934 F.2d 353, 356-358 (D.C. Cir.) (due process), cert. denied, 502 U.S. 896 (1991); United States v. Harrison, 918 F.2d 30, 33 (5th Cir. 1990) (same); United States v. Levy, 904 F.2d 1026, 1035-1036 (6th Cir. 1990) (same), cert. denied, 498 U.S. 1091 (1991); United States v. LaGuardia, 902 F.2d 1010, 1013-1017 (1st Cir. 1990) (same); United States v. Lewis, 896 F.2d 246, 248-249 (7th Cir. 1990) (same); United States v. Francois, 889 F.2d 1341, 1343-1345 (4th Cir. 1989) (same), cert. denied, 494 U.S. 1085 (1990); United States v. Grant, 886 F.2d 1513, 1513-1514 (8th Cir. 1989) (due process).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MELENDEZ, JUAN **Petitioner**	)	
vs.	)	**No. 95-5661**
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 20th day of September 1995.

PATRICK A. MULLIN
25 MAIN STREET
HACKENSACK, NJ 07601

Drew S. Days, III

DREW S. DAYS, III
Solicitor General

September 20, 1995

(4)

No. 95-5661

In The

Supreme Court of the United States

October Term, 1995

JUAN MELENDEZ,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

DREW S. DAYS, III
Solicitor General of the United States
U.S. Department of Justice
Washington, DC 20530
(202) 514-2217
Counsel for Respondent

PATRICK A. MULLIN
Counsel of Record
25 Main Street
Court Plaza North
Hackensack, NJ 07601
(201) 487-9282
Counsel for Petitioner

Of Counsel:

DAVID ZLOTNICK
1001 Pennsylvania Avenue, N.W.
Suite 200 South
Washington, DC 20004
(202) 457-4204

PETER GOLDBERGER
The Ben Franklin
Suite 400
Chestnut Street at Ninth
Philadelphia, PA 19107
(215) 923-1300

Petition For Writ Of Certiorari Filed August 15, 1995
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6/30/93	MOYA & MELENDEZ – Minutes of 6/23/95. Defts. retracted their pleas of Not Guilty and entered pleas of GUILTY to Ct. 1 of Ind. Ordered sentence date set for 9/8/93. Ordered defts remanded. Fld. 6/23/93 (Sarokin) (PL)
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES

v. Case No. 92-713-02

JUAN MELENDEZ

EXCERPTS OF SENTENCING HEARING

* * *

MR. KATZ: Your Honor, I wanted to point out to the Court we reached a plea agreement with the prosecutor in New York with a three to nine-year sentence, and that would be the State sentence.

THE COURT: Thank you.

That is what I was going to address first.

I do not think that this Court at this juncture has the right to make the sentence to be imposed concurrent with a sentence that is not yet imposed, and I would suggest that that application be made to the State Court.

If it is rejected, I will certainly entertain an application after the fact to make this sentence concurrent without ruling on it. I obviously need to know what discretion, if any, the Court has in that type [sic] situation, so at this moment, the request to make this sentence concurrent with the State sentence to be imposed will be denied without prejudice.

The Court has considered the probation report, the allocution [sic] of counsel and defendants, as well as the correspondence that has been received on behalf of the

defendants, together with the statement and letter received by the Government.

As a result of the pleas in this matter, the defendants face a maximum punishment of ten years to life imprisonment, and the appropriate guideline range in each instance is 135 to 168 months.

The Government in each instance has made a motion for a downward departure, but as Mr. Rivas points out, there has been no motion to go below the statutory mandatory minimum pursuant to 18 USC 3553(e). Under those circumstances and under the present status of the law, the lowest sentence that the Court could impose is 120 months.

I accept the statements of remorse by the defendants. I am sure now they realize what they have done to themselves and to their families, and yet on the other hand, we have to also recognize what the Government has clearly articulate here today, that other families are very much affected by the sale of drugs.

Will the defendants please rise?

Pursuant to the Sentencing Reform Act of 1984 and granting the Government's motion for a downward departure, it is the judgment of the Court that each of the defendants is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 120. In each instance, I am honoring the request made by defense counsel.

Upon release from imprisonment, each defendant shall be placed on supervised release for a term of five years.

* * *

U.S. DEPARTMENT OF JUSTICE

J.A. 53

United States Attorney
District of New Jersey

Federal Building - Room 502 *201/645-2700*
970 Broad Street *FTS/348-2700*

Newark, New Jersey 07102

AR:mc
9206243

May 10, 1993

Robert P. Leighton, Esq
15 Park Row
New York, New York 10038

Re: Plea Agreement with Juan Melendez
Criminal No. 92-713

Dear Mr. Leighton:

This letter sets forth the full and complete agreement between Juan Melendez and the United States Attorney for the District of New Jersey. If the offer is not accepted and signed by the close of business on May 21, 1993, the offer will be withdrawn.

Charge

Conditioned on the understandings specified below, the United States will accept a guilty plea from Juan Melendez to count 1 of the Indictment, Criminal No. 92-713, which charges that Juan Melendez conspired with others to possess with the intent to distribute over 5

kilograms of cocaine, in violation of 21 U.S.C. § 846. If Juan Melendez enters a guilty plea and is sentenced on this charge, the United States Attorney for the District of New Jersey will not bring any further charges against Juan Melendez relating to the illegal possession and distribution of drugs between July 1, 1992 and December 31, 1992. This agreement not to prosecute further is limited to that criminal activity of which Juan Melendez has made this office aware as of the date of this agreement.

Cooperation

Juan Melendez shall truthfully disclose all information concerning all matters about which this Office inquires of him. Juan Melendez shall make himself available at all reasonable times requested by representatives of the Government and shall truthfully testify in the grand jury and at any trial as to any subject about which he is questioned. Furthermore, Juan Melendez agrees to provide to this Office upon request all documents and other materials that are relevant to the investigation and that are in Juan Melendez's possession or under his control.

Juan Melendez's cooperation includes participation in affirmative investigative techniques, including, where possible, making telephone calls and introductions of law enforcement officials to individuals about whom Juan Melendez has provided information concerning criminal activity. All such activity by Juan Melendez must be conducted only at the express direction and under the supervision of this Office and federal law enforcement personnel.

Should Juan Melendez withdraw from this agreement, or should Juan Melendez commit any federal, state, or local crime between the date of this agreement and his sentencing in this matter, or should it be established that Juan Melendez intentionally has given materially false, misleading, or incomplete testimony or information or otherwise has violated any provision of this agreement, this agreement and its benefits to Juan Melendez shall be null and void. Thereafter, Juan Melendez shall be subject to prosecution for any federal criminal violation of which this Office has knowledge, including but not limited to, perjury and obstruction of justice. Any such prosecution may be premised upon any information provided by Juan Melendez, and such information may be used against him.

Sentence and Other Penalties

The sentence to be imposed upon Juan Melendez is within the sole discretion of the sentencing judge, subject to the provisions of the Sentencing Reform Act, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, and the United States Sentencing Guidelines. The sentencing judge may impose the maximum term of imprisonment and the maximum fine that are consistent with the Sentencing Reform Act and the Sentencing Guidelines, up to and including the statutory maximum term of imprisonment and the statutory maximum fine.

The violation of 21 U.S.C. § 846 charged in Count 1 of the Indictment carries a statutory mandatory minimum penalty of 10 years' imprisonment, a maximum penalty of

life years' imprisonment and a $4,000,000.00 fine. Pursuant to 21 U.S.C. § 855, the sentencing judge may impose an alternative fine of twice the gross profits or other proceeds to Juan Melendez. The Sentencing Reform Act and the Sentencing Guidelines also may impose a minimum term of imprisonment and/or fine, and the Sentencing Guidelines may authorize departure from the minimum and maximum penalties under certain circumstances. All fines imposed by the sentencing court are subject to the payment of interest.

Further, in addition to imposing any other penalty on Juan Melendez, the sentencing judge: (1) will order Juan Melendez to pay an assessment of $50 per count, pursuant to 18 U.S.C. § 3013; and (2) pursuant to 21 U.S.C. § 841, will require Juan Melendez to serve a term of supervised release of at least 5 years, which will begin at the expiration of any term of imprisonment imposed. Should Juan Melendez be placed on a term of supervised release and subsequently violate any of the conditions of supervised release before the expiration of its term, Juan Melendez may be sentenced to an additional term of imprisonment equal to all of the term of supervised release previously imposed, without credit for time previously served on post-release supervision and in addition to the statutory maximum term of imprisonment set forth above.

Stipulations

The United States and Juan Melendez agree to stipulate at sentencing to the statements set forth in the attached Schedule A, which hereby is made a part of this

plea agreement. This agreement to stipulate, however, cannot and does not bind the sentencing court, which may make independent factual findings and may reject any or all of the stipulations entered into by the parties. Moreover, this agreement to stipulate on the part of the United States is based on the information and evidence that this Office possesses as of the date of this plea agreement. Thus, if this Office obtains or receives additional evidence or information prior to sentencing that it determines to be credible and to be materially in conflict with any stipulation in the attached Schedule A, the United States shall not be bound by any such stipulation. A determination that any stipulation is not binding shall not release either the United States or Juan Melendez from any other portion of this plea agreement, including any other stipulation.

Rights and Obligations of U.S. Attorney's Office at Sentencing

The Office cannot and does not make any representation or promise as to what guideline range will be found applicable to Juan Melendez, or as to what sentence Juan Melendez ultimately will receive. This Office, however, does reserve its right to take a position with respect to the appropriate sentence to be imposed on Juan Melendez by the sentencing judge. In addition, this Office will inform the sentencing judge and the Probation Office of: (1) this agreement; (2) the nature and extent of Juan Melendez's activities and relevant conduct with respect to this case; (3) the full nature, extent, and significance of Juan Melendez's cooperation with this Office and when such cooperation commenced; and (4) all other information

relevant to sentencing, favorable or otherwise, in the possession of this Office.

Further, if Juan Melendez fully complies with this agreement and, prior to his sentencing, provides substantial assistance in the investigation or prosecution of one or more persons who have committed offenses, the United States: (1) will move the sentencing court, pursuant to Section 5K1.1 of the Sentencing Guidelines, to depart from the otherwise applicable guideline range; or (2) in the event that the sentencing court declines to depart form the applicable guideline range, will recommend that the sentencing court impose the minimum sentence required under the applicable guideline range.

The United States specifically reserves the right to correct factual misstatements relating to sentencing proceedings; to appeal Juan Melendez's sentence pursuant to 18 U.S.C. § 3742(b); and to oppose any appeal of his sentence by Juan Melendez pursuant to 18 U.S.C. § 3742(a).

Other Provisions

This agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local prosecuting authorities. However, this Office will bring this agreement and the cooperation of Juan Melendez to the attention of other prosecuting offices, if requested to do so.

Finally, this agreement was reached without regard to any civil matters that may be pending against Juan Melendez, including, but not limited to, proceedings by

the Internal Revenue Service relating to potential civil tax liability.

This agreement constitutes the full and complete agreement between Juan Melendez and the United States Attorney for the District of New Jersey. No additional promises, agreements, or conditions have been entered into other than those set forth in this letter, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

MICHAEL CHERTOFF
United States Attorney

By: /s/ Alberto Rivas
ALBERTO RIVAS
Assistant U.S. Attorney

APPROVED:

/s/ Illegible

I have received this letter from my attorney, Robert P. Leighton, Esq., and it has been translated to me into Spanish, and I understand it fully. I hereby acknowledge that it fully sets forth my agreement with the Office of the United States Attorney for the District of New Jersey. I state that there have been no additional promises or representations made to me by any officials or employees

of the United States Government or by my attorney in connection with this matter.

_____
Juan Melendez

Witnessed by:

_____
Robert P. Leighton, Esq.
Counsel for Juan Melendez

Date:

PLEA AGREEMENT WITH Juan Melendez

Schedule A

The United States and Juan Melendez agree to stipulate at sentencing to the statements set forth below, subject to the conditions in the attached plea agreement.

1. It is stipulated that If Juan Melendez continues to recognize and affirmatively accept personal responsibility for his criminal conduct he is entitled to a 2 point reduction in the overall offense level pursuant to § 3E1.1(a) of the Guidelines.

2. It is stipulated that pursuant to § 3E1.1(b)(1) of the Guidelines the defendant is entitled to an additional decrease of 1 level for timely notifying the authorities of his intention to enter a plea of guilty, so long as he continues to qualify for stipulation 1 above.

3. It is stipulated that pursuant to § 2D1.1(4) of the Sentencing Guidelines the applicable guideline range for this defendant is 50 to 150 kilograms of cocaine.

4. The government further agrees to recommend that any custodial sentence imposed by the Court be concurrent to any other sentence.

U.S. Department of Justice

United States Attorney
District of New Jersey

970 Broad Street, Room 502 *201/645-2700*
Newark, New Jersey 07102

October 7, 1993

Hon H. Lee Sarokin
United States District Judge
United States District Court
Federal Plaza
Newark, New Jersey 07102

RE: **United States v. Edwin Moya**
United States v. Juan Melendez
Criminal No. 92-713

Dear Judge Sarokin:

Please accept this letter in lieu of a formal brief in support of the motion of the United States to impose on defendants Moya and Melendez in the above-captioned matter a sentence lower than what the Court has determined to be the otherwise applicable under the sentencing guidelines. This motion is made pursuant to Section 5K1.1 of the United States Sentencing Guidelines and the written plea agreements dated May 10, 1993.

After learning of the cooperating plea agreement entered into by co-defendant Bienvenido Polanco, both defendants simultaneously agreed to change their pleas and entered into written plea agreements with the United States. As part of the agreements they agreed to be debriefed and disclose whatever information they had

regarding narcotic trafficking. The two defendants met with law enforcement representatives on at least 4 occasions where they answered all the questions posed to them.

Because of the assistance provided to this Office and the New York County District Attorney's Office and pursuant to the plea agreements entered into between the United States and Moya and Melendez, it is the position of the U.S. Attorney's Office for the District of New Jersey that defendants Moya and Melendez deserve a reduction of their sentences from the applicable minimum sentence under the Sentencing Guidelines.

MICHAEL CHERTOFF
UNITED STATES ATTORNEY

By: /s/ Alberto Rivas
ALBERTO RIVAS
Assistant U.S. Attorney

cc: Morton Katz, Esq.
Robert Leighton, Esq.
Carolyn McGovern-Wojcik, U.S.P.O.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
VS.	(For Offenses Committed On or After November 1, 1987)
JUAN MELENDEZ	Case Number: 92-713-02
(Defendant's Name)	ROBERT P. LEIGHTON Attorney's Name

THE DEFENDANT:

X plead guilty to count(s) one.
___ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
21:841(a)	Conspiracy to possess with the intent to distribute cocaine	9/8/93	one

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on counts _____ and is discharged as such count(s).

___ Count(s) _____ (is) (are) dismissed on the motion of the United States.

_X_ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) _____, which shall be due _X_ immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by the judgment are fully paid.

Defendant's Soc. Sec. No.: 091-70-6510
Defendant's Date of Birth: 12/15/66

Defendant's Address:

8506 Liberty Ave.
North Bergen, NJ

November 23, 1993
Date of Imposition of Sentence

/s/ H. Lee Sarokin
Signature of Judicial Officer

Hon. H. Lee Sarokin
Name & Title of Judicial Officer

Date: 11/29/93

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 120 months

___ The court makes the following recommendations to the Bureau of Prisons:

_X_ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district.

___ at ___ a.m. on _____.

___ as notified by the United States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

___ before a.m./p.m. on _____.

___ as notified by the United States Marshal.

___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

___ Defendant delivered on ___ to _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a conditions [sic] of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

The defendant shall cooperated with the Immigration and Naturalization service to resolve any problems with his status in the United States. The defendant shall provide truthful information and abide by the rules and regulations of the Immigration and Naturalization Service. If deported, the defendant shall not reenter the United

States without written permission of the Attorney General. If the [sic] reenters the U.S., he shall report in person to the nearest U.S. Probation Office within 48 hours.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer with [sic] 72 hours of change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrest [sic] or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history of characteristics, and shall permit probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

___ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 33

Criminal History Category: I

Imprisonment Range: 135 to 168 months

Supervised Release Range: ___ to 5 years

Fine Range: $17,500 to $4,000,000

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

___ Full restitution is not ordered for the following reason(s):

___ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

X upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s):

_____

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ

Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. Action No. 92-cr-00713-2)

Argued February 16, 1995

BEFORE: STAPLETON and COWEN, *Circuit Judges*, and HUYETT, *District Judge**

(Opinion Filed May 22, 1995)

OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

Juan Melendez appeals his sentence. The first issue presented concerns a district court's authority to depart downward from a statutory minimum sentence based

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*Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

upon the defendant's substantial assistance with a criminal investigation where the government has moved under USSG §5K1.1 for a departure below the U.S. Sentencing Guideline range but has not moved under 18 U.S.C. § 3553(e) for a departure below the statutory minimum. We hold that, under such circumstances, a district court's authority under §5K1.1 to depart below the Sentencing Guideline range does not permit it to depart below a lower minimum sentence set by statute. The second issue concerns Melendez's motion for a downward departure pursuant to application note 17 to USSG §2D1.1. We agree with the district court that §2D1.1 application note 17 does not permit a district court to depart downward from a statutory minimum sentence. The final issue concerns Melendez's contention that the district court should have permitted him to withdraw his guilty plea. The record establishes that Melendez in fact did not attempt to withdraw his plea before the district court.

I.

Melendez and codefendant Edwin Moya were approached by confidential informants of the United States Customs Service posing as importers and transporters of cocaine. This initial contact led to several meetings, during which Melendez, Moya, and the confidential informants discussed the availability of cocaine for distribution. The discussions culminated in a meeting during which Melendez and Moya gave the confidential informants $10,000 as a deposit toward the transportation expenses for 24 kilograms of cocaine. The next day, the two codefendants deposited an additional $2500 for the transportation of the cocaine.

Shortly thereafter, Moya and Melendez were arrested by New York authorities on unrelated drug charges. After their arrest, Moya's common law wife, Anna Maria Ferrara, her brother Raphael Ferrara, and her uncle Bienvenido Polanco, held further negotiations with the confidential informants for a 225-kilogram cocaine purchase. Government agents ultimately made a controlled delivery of 30 kilograms of cocaine to Raphael Ferrara and Polanco. Raphael Ferrara and Polanco were arrested shortly after taking possession of the drugs and Anna Maria Ferrara was arrested on the following day.

Melendez was charged with conspiring, in violation of 21 U.S.C. § 846, to distribute and to possess with intent to distribute more than five kilograms of cocaine, a crime that carries a statutory minimum sentence of 10 years' imprisonment. 21 U.S.C. § 841(b)(1)(A). He originally pleaded not guilty. Plea negotiations ensued, however, and Melendez ultimately signed a cooperating plea agreement. The agreement provided, in pertinent part, that in return for Melendez's cooperation with the government's investigation and his pleading guilty, the government would move for a downward departure from the applicable Guideline range pursuant to USSG §5K1.1. The agreement did not require the government to file a § 3553(e) motion to depart below the statutory minimum, however. Melendez retracted his plea of not guilty and pleaded guilty to the charged conspiracy.

The probation officer determined that the Guideline sentencing range applicable to Melendez's crime was 135 to 168 months. The government, in accordance with the agreement, moved for a downward departure from that Guideline range, pursuant to §5K1.1, in recognition of

Melendez's substantial assistance in the investigation or prosecution of another person. The district judge granted that motion, and departed downward from the sentencing range set by the Guidelines. However, because the government had not also moved pursuant to § 3553(e), the judge ruled that he had no authority to depart below the statutory minimum and meted out the 10-year minimum sentence required by statute. Melendez maintains that this was error. He argues that a §5K1.1 motion not only triggers the court's authority to depart downward from the sentencing level set by the Guidelines but also triggers the court's authority to depart below a lower, statutory minimum.

II.

The government maintains that Melendez waived or forfeited his right to appeal this issue, claiming that Melendez never formally argued to the district court that the government's §5K1.1 departure motion empowered the court to depart below the 10-year statutory minimum. To preserve the right to appeal a district court ruling, "it is sufficient that a party, at the time the ruling . . . is made or sought, makes known to the court the action which that party desires the court to take . . . and the grounds therefor." Fed.R.Crim.P. 51. Moreover, "[t]he general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance." 3A Charles A. Wright, *Federal Practice & Procedure* § 842, 289-90 (1982 & Supp.

1994); *see also Government of Virgin Islands v. Joseph*, 964 F.2d 1380, 1384-85 (3d Cir. 1992) (rejecting the government's contention that an issue was not preserved for appeal because the court had been made aware of the issue and because a contemporaneous objection would not have further aided the district court); *cf. United States v. 57.09 Acres of Land*, 757 F.2d 1025, 1027 (9th Cir. 1985) (noting that the government did not waive its right to object to jury instructions because the court had been made "aware of the government's objection"); *Bass v. Department of Agriculture*, 737 F.2d 1408, 1413 (5th Cir. 1984) (noting the established rule in civil cases "that formal objection is not necessary if the trial judge was fairly apprised of the nature of the objection").

Our review of the record reveals that Melendez in fact "[made] known to the court the action which [he] desire[d] the court to take." As the Assistant United States Attorney admitted during the sentencing hearing: "Both defendants through counsel have argued that the Court depart downward from this mandatory minimum." (App. at 24a.) Moreover, the district court was made well aware of the underlying legal debate over whether a §5K1.1 motion permits a district court to depart below a statutory minimum. The government admitted during the sentencing hearing that "[s]ome arguments indicate that the law doesn't require the Court to impose the mandatory minimum." (App. at 24a.) Most importantly, the district court clearly understood that Melendez was asserting these arguments; it expressly addressed and resolved the issue of the court's authority to depart below the statutory minimum. In this context, there was no need for Melendez to take the additional step of repackaging

the government's statement as his own formal objection to preserve his right to appeal. Any such requirement would elevate form over substance. Thus, we conclude that this issue is properly preserved for appeal and we will proceed to the merits of Melendez's argument.

III.

Congress has decreed that a person who distributes, or conspires to distribute, five kilograms or more of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years." 21 U.S.C. § 841(b)(1)(A). This statute represents a Congressional judgment about the seriousness of this offense and the degree of sanction necessary to punish and deter this kind of conduct.

At the same time, Congress has recognized that the value to society of the cooperation of an individual charged with this kind of offense can, under some circumstances, outweigh the benefit to be derived from imposing the statutory minimum sentence. Accordingly, Congress has authorized sentences below this and other statutory minima. Section 3553(e) of Title 18 provides:

> **(e) Limited authority to impose a sentence below a statutory minimum.** – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the

> Sentencing Commission pursuant to section 994 of title 28, United States Code.

Notably, Congress has authorized sentences below a statutory minimum only upon the prosecution's motion; that is, before a court may depart below a statutory minimum, the prosecutor first must determine that the value of the cooperation is sufficiently great to warrant overriding Congress's judgment concerning the minimum appropriate sentence. By requiring a government motion, Congress thus gave the prosecutor the sole key that affords access to a sentence below a statutory minimum. *Wade v. United States*, 112 S.Ct. 1840, 1843 (1992).

That the prosecutor holds the sole key to the area below the statutory minimum does not mean that the sentencing court, once the prosecutor has made a § 3553(e) motion, has unbridled discretion to set a defendant's sentence, however. As the final sentence of § 3553(e) reflects, Congress contemplated that the limited downward departure authority there bestowed on a sentencing court would be exercised in the context of, and in a manner consistent with, a system of Guidelines sentencing that was being constructed at the time of the passage of § 3553(e). Consistent with this approach, § 994(n) of Title 28 of the Sentencing Reform Act of 1984 directs the Sentencing Commission to formulate Guidelines that will reflect the general appropriateness of rewarding cooperation with sentences lower than they would otherwise be, including sentences below a statutory minimum. Section 994(n) of Title 28 provides in pertinent part:

> The [Sentencing] Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would

> otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Although § 994(n) directs recognition of the principle that a lower sentence for cooperation can be appropriate, it says nothing about a process for identifying particular cases in which such a sentence may be appropriate. Accordingly, nothing in the text of § 994(n) suggests that Congress intended by the passage of § 994(n) to take back the access key given to the prosecutor in § 3553(e). The same can be said for the legislative history of § 994(n). The most one can argue, from Melendez's perspective, is that § 994(n) *may authorize the Commission* to take back that key. The text of § 994(n) does not seem to us to require that reading, however, and the legislative history provides no evidence of such an intent on the part of Congress.

Under § 994(n), the principle that a lower sentence for cooperation may be appropriate applies as well to sentences established by the Guidelines. Here also § 994(n) says nothing about how particular cases appropriate for such sentences will be identified. Thus, nothing in § 994(n) requires the Commission to give the prosecutor an exclusive access key to sentences *below the Guideline range* in return for cooperation.

The Commission exercised the authority given to it in this area by promulgating USSG §5K1.1. That Guideline and its first application note provide in relevant part:

§5K1.1. *Substantial Assistance to Authorities (Policy Statement)*

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

* * *

Application Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

There are two things about this action of the Commission that seem to us important in the current context. The first is that the sole authority granted in §5K1.1 is for departures "from the guidelines." Given the express reference in the application note to statutes authorizing departures "below a statutorily required minimum sentence," we believe this limitation must represent an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e).[1]

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[1] Where a statutory minimum is above the Guideline range, it becomes "the guideline sentence." USSG §5G1.1(b). We do not suggest that two motions are required in such circumstances. A motion under either § 3553(e) or §5K1.1 will suffice to demonstrate that the requisite exercise of prosecutorial discretion has occurred.

Second, §5K1.1 reflects a policy decision *on the part of the Commission* to give the prosecutor a veto power over departures below the Guideline range based on cooperation. The Commission thus recognized the value of letting the prosecutor's discretion control access to the area between the applicable Guideline range and any applicable, lower statutory minimum, just as § 3553(e) allows that discretion to control access to the area below a statutory minimum.

With this background, we turn to Melendez's argument. He must first ask us to conclude that Congress in § 944(n) authorized the Commission to take back the access key granted to the prosecutor in § 3553(e). While we question this proposition, we may accept it *arguendo* here. Melendez next insists that the Commission, while recognizing the value of allowing the prosecutor to control access to departures for cooperation below the Guideline range, created a system under which he or she can grant access to the area between the Guideline range and a lower statutory minimum only by surrendering his or her access control to the area below the statutory minimum. Melendez tenders no persuasive reason, however, why the Commission might have chosen to create such a seemingly incongruent system.

The root issue for decision here is whether the prosecutor in a given case will be able to grant access to a Guideline departure for cooperation and at the same time retain control of access to a departure from a lower, statutory minimum. A literal reading of §5K1.1 would indicate that a prosecutor has this option. This conclusion is consistent as well with the Congressional judgment reflected in § 3553(e). Moreover, no policy considerations

appear to counsel against this conclusion and a number counsel in favor. Indeed, beyond this case, a denial of this option for the prosecution would appear to be in no one's best interest. As Judge Easterbrook observed in his dissent in *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994):

> Section 3553(e) and Guideline 5K1.1 permit a prosecutor to offer a reward for assistance. This process works best if the amount of the reward can be graduated to the value of the assistance – a value the prosecutor (who sees the full menu of crimes and potential cases in the district) can assess better than a judge. . . . [H]olding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate [will curtail] the prosecutor's ability to match the reward to the assistance. When cooperation can be procured for a modest reduction, a lower sentence overcompensates the defendant, at the expense of the deterrence force of the criminal law. Another consequence is that there will be fewer motions of any kind. If filing a motion under § 5K1.1 permits the judge to cut the sentence by three-quarters (as happened here), the prosecutor will insist on a great deal of assistance. Many defendants are unlucky enough to have little of value to offer. . . . They are now condemned to serve the full authorized sentence, even though a prosecutor possessed of power to differentiate might reward slight aid with a slight reduction.

We hold that a motion under USSG §5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not

authorize a sentencing court to impose a sentence lower than a statutory minimum.[2]

IV.

Melendez next argues that the government's confidential informants offered to sell him cocaine at prices substantially below market price, thereby leading him to purchase a significantly greater quantity of cocaine than he ordinarily would have been able to purchase given his available funds. He maintains further that the $12,500 he had available for the drug deal would have enabled him to purchase, on the open market, only between one-half and three-quarters of a kilogram of cocaine instead of the more than 50 kilograms attributed to him by the district court. These facts, he contends, mandate a downward departure under application note 17 to USSG §2D1.1.[3]

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[2] In so concluding, we join the Court of Appeals for the Eighth Circuit. *United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir. 1992). We respectfully disagree with the other courts of appeals that have addressed the same issue. *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). We note our accord with the thoughtful dissents in *Wills* and *Keene*.

[3] Application note 17 states:

> If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance

Melendez is not in a position to make these arguments, however. In his plea agreement, he specifically stipulated that his applicable Guideline range was 50 kilograms to 150 kilograms of cocaine. Moreover, the probation report determined that the applicable quantity of cocaine to be 75 kilograms and neither Melendez's objections to the presentence report nor his sentencing letter to the district court requested that less than five kilograms should be attributed to him. We accordingly conclude that the district court properly attributed more than five kilograms of cocaine to Melendez.

Having determined that the district court properly attributed in excess of five kilograms of cocaine to Melendez, the district court then was constrained to impose the statutory minimum sentence of 10 years' imprisonment. *See, e.g., United States v. DeMaio*, 28 F.3d 588, 591 (7th Cir. 1994) (holding that a sentencing court may not depart below a statutory minimum on any ground other than substantial assistance to criminal investigation); *United States v. Rudolph*, 970 F.2d 467, 470 (8th Cir. 1992) (holding that defendant's diminished capacity, while grounds for departure from the Guidelines sentencing range, is not grounds for departure below the minimum sentence set by Congress), *cert. denied*, 113 S. Ct. 1023 (1993); *United States v. Valente*, 961 F.2d 133, 135 (9th Cir. 1992) (holding that defendant's

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than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

aberrant behavior will not justify a departure below a statutory minimum).

V.

Finally, Melendez argues that the district court should have given him an opportunity to withdraw his guilty plea once he learned that the government did not intend to recommend a sentence below the 10-year statutory minimum. This issue also was not properly preserved for appeal. Although Melendez, in a brief filed *pro se*, maintains that he expressed his desire to withdraw his plea both in conversations with his attorney and in a letter to the court, nothing in the docket sheet or the record before this court supports those claims. Moreover, Melendez failed to express his alleged desire to withdraw his plea when he addressed the court at his sentencing. Because Melendez failed to raise this issue before the district court, we cannot address it here. *See, e.g., United States v. Johnson*, 359 F.2d 845, 846 (3d Cir. 1966) (noting that questions cannot be presented on appeal that have not first been determined by the district court).

VI.

We will affirm the judgment of the district court.

HUYETT, District Judge, dissenting:

I join in Parts I, II, and V of the majority opinion, and respectfully dissent with respect to Parts III, IV, and VI. Although the issue is a close one, I believe the majority has erred in holding that when a sentencing court grants a USSG § 5K1.1 motion to depart below the guideline

sentence, the court may not impose a sentence below the statutory minimum unless the § 5K1.1 motion is accompanied by a motion under 18 U.S.C. § 3553(e). I believe the court should follow the position accepted in the majority of circuits that have considered this issue. *See United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991). *But see United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 375, 121 L. Ed.2d 287 (1992).

The majority correctly reasons that 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) are silent with respect to whether the prosecutor should be given exclusive access to sentences below the Guideline ranges. I believe the majority errs, however, in determining that § 5K1.1 reflects the Sentencing Commission's advertent decision to give the prosecutor a veto over departures below the Guideline ranges and to leave departures below the statutory minima to the authority conferred by § 3553(e).

A careful reading of the sentencing guidelines and its commentary leads to an opposite conclusion. Guideline commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, ___ U.S. ___, ___, 113 S. Ct. 1913, 1915, 123 L. Ed.2d 598 (1993). With this direction in mind, I believe the court should give more careful consideration to the commentary to the guidelines.

Section 5K1.1 must be read together with application note 1 which reads:

> Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

USSG § 5K1.1 comment. (n.1). I believe this note expresses the Sentencing Commission's intent that § 5K1.1 serve as a "conduit" for the application of § 3553(e), *see Cheng Ah-Kai*, 951 F.2d at 493, and not an attempt to create two separate motions concerning substantial assistance. Application Note 7 to USSG § 2D1.1, the guideline concerning drug offenses, further supports this interpretation and reads as follows:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* § 5K1.1 (Substantial Assistance to Authorities).

USSG § 2D1.1 comment. (n.7). The reference to § 5K1.1 rather than to § 3553(e) illustrates the Commission's determination that departures from the statutory minimum sentence are a mere subset of departures from the guidelines. This cross referencing, along with the substantial cross referencing between § 5K1.1, § 3553(e), and

§ 994(n) supports the conclusion that the district court has discretion. *See Keene*, 933 F.2d at 714.

I also disagree with the majority's view that "no policy considerations appear to counsel against this conclusion and a number counsel in favor" of its conclusion. Majority Op. at 135. Other circuits have ably raised policy considerations that counsel against the majority's position. The Ninth Circuit, for example, reasoned that with regard to the powers conferred on the government by § 5K1.1 and § 3553(e), "[o]nce the motion is made by the government, a transfer of discretion regarding the range of departure could well frustrate Congress' goal of eliminating sentencing disparity given the absence of appellate review over the prosecutor's activity." *Keene*, 933 F.2d at 715. In addition, an interpretation that provides two separate and distinct types of departure "would lead to a usurpation of the discretion of the district court." *Cheng Ah-Kai*, 951 F.2d at 494.

Although permitting the judge to depart below the guidelines or the statutory minimum on the basis of a § 3553(e) or § 5K1.1 motion curtails the prosecutor's ability to match the reward to the assistance, the defendant's sentence will still reflect his cooperation. Judges are quite capable of making this determination and should be permitted to exercise their sound discretion. *See id.; Keene*, 933 F.2d at 714.

I would vacate the sentence imposed by the district court and remand this case for resentencing. Therefore, I dissent.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ, Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. No. 92-00713-2)

Present: STAPLETON and COWEN, *Circuit Judges*,
and HUYETT, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 16, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 1, 1993, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Illegible
Clerk

Dated: May 22, 1995

---

* Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5755

UNITED STATES OF AMERICA

v.

JUAN MELENDEZ,

Appellant

SUR PETITION FOR REHEARING

BEFORE: *SLOVITER, Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, and McKEE, *Circuit Judges,* and HUYETT, *District Judge**

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

---

* Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Judges Becker, Hutchinson, Scirica, Nygaard, Roth, and McKee would grant rehearing.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: JUN 27 1995

SUPREME COURT OF THE UNITED STATES

No. 95-5661

Juan Meleandez [sic],

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 6, 1995

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(5)

No. 95-5661

In The

Supreme Court of the United States

October Term, 1995

JUAN MELENDEZ,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITIONER'S BRIEF ON THE MERITS

PATRICK A. MULLIN
Counsel of Record
25 Main Street
Court Plaza North
Hackensack, NJ 07601
Telephone: (201) 487-9282
Attorney for Petitioner

Of Counsel:

DAVID ZLOTNICK
1001 Pennsylvania Avenue, N.W.
Suite 200 South
Washington, DC 20004
(202) 457-4204

PETER GOLDBERGER
The Ben Franklin
Suite 400
Chestnut Street at Ninth
Philadelphia, PA 19107
(215) 923-1300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

Once the prosecutor moves for a sentencing departure in recognition of a defendant's substantial assistance to law enforcement, does a federal court have authority to impose a sentence beneath both the guideline range and a minimum term set by statute, even when the government does not seek the latter degree of departure?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Juan Melendez and the United States). Edwin Moya, Raphael Ferrera, Bienvenido Polanco and Ana Mercedes Ferrera were co-defendants in the District Court, but were not parties to the appeal or in this Court.

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OPINIONS BELOW

The Third Circuit's Opinion (J.A. 22-38) (per Stapleton, J. with Cowan, J.; Huyett, U.S.D.J., dissenting) and the Court's accompanying Judgment (J.A. 34) were filed on May 22, 1995. The Opinion is published as *United States v. Melendez*, 55 F.3d 130 (1995). There is no published opinion of the District Court. The Judgment of the District Court (H. Lee Sarokin, U.S.D.J.) imposing sentencing was dated as to petitioner, Juan Melendez, on November 29, 1993 (J.A. 15-21).

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on May 22, 1995. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied on June 27, 1995 (J.A. 40-41). The Petition was filed on August 16, 1995. *See* S.Ct. Rules 13.1. Certiorari was granted on November 6, 1995 (J.A. 42). This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Due to their number and length, the statutes and regulations involved (18 U.S.C. §3553(e), 28 U.S.C. §994(n) and U.S.S.G. §5K1.1 (p.s.) and relevant commentary are reproduced in the Appendix to this Brief (App. 1-7).

STATEMENT OF THE CASE

This case presents sentencing issues arising out of the petitioner's conviction for conspiracy to distribute cocaine.

A. Statement of Facts

Petitioner and Edwin Moya were approached by confidential informants of the United States Customs Service posing as drug dealers. After two months of abortive discussions, they arranged the purchase of at least 25 kilograms of cocaine in North Bergen, New Jersey. They gave a $10,000.00 deposit on Novembe: 14, 1992, with an additional $2,500.00 paid the next day. Four days later, petitioner and Edwin Moya were arrested and incarcerated on separate New York State drug charges.

Afterwards, co-defendants Ana Mercedes Ferrera, Raphael Ferrera and Bienvenido Polanco negotiated three separate cocaine transactions with Customs agents, each deal encompassing 75 kilograms of cocaine. After Raphael Ferrera and Bienvenido Polanco picked up the first shipment of drugs on December 15, 1992, they were arrested. Ana Mercedes Ferrera was arrested the following day.

B. Procedural History

On December 18, 1992, a federal grand jury sitting in the District of New Jersey indicted the petitioner and co-defendants Moya, the Ferreras and Polanco. Petitioner was named in Count One which charged a conspiracy, in violation of 21 U.S.C. §846 to distribute in excess of five

kilograms of cocaine, punishable under *Id.*, Section 841(a)(1)(a)(ii). Petitioner was not named in the second and final Count.

On May 10, 1993, petitioner entered into a plea agreement with the government (J.A. 4-12). The agreement provided that, in return for petitioner's substantial assistance, the government "will move before the sentencing court, pursuant to U.S.S.G. §5K1.1 (p.s.), to depart from the otherwise applicable Guideline range" (J.A. 9). The agreement, drafted by the government, failed to provide notice that the government would oppose departure below the ten-year mandatory minimum penalty otherwise required in Count One.

On October 7, 1993, the government moved under §5K1.1 and the "written plea agreement dated May 10, 1993" for a "sentence lower than what the court had determined to be otherwise applicable under the Sentencing Guidelines" (J.A. 13-14). The government did not advise the court that it would oppose a departure under the ten-year mandatory minimum. Nor did the government articulate in its §5K1.1 motion its legal position that a separate motion for departure below the mandatory minimum was required under §3553(e).

The probation department prepared a pre-sentence investigative report dated July 26, 1993. The probation department calculated petitioner's guideline range for imprisonment between 135 and 168 months. The report further noted that a ten-year mandatory minimum was applicable under 21 U.S.C. §841(b).

At the November 23, 1993 sentencing hearing, the government argued for the first time, that "absent a

motion under §3553(e)," petitioner's sentence could not be less than ten years. The government insisted that the district court was powerless to depart below the ten-year mandatory minimum on its own initiative. The district court agreed with the government and sentenced petitioner to 120 months' incarceration.

Petitioner appealed the district court's ruling. A Third Circuit panel affirmed. *United States v. Melendez*, 55 F.3d 130 (1995). The majority ruled that a second, separate government motion is necessary for departures below mandatory minimums under §3553(e). The panel found that the United States Sentencing Commission was granted authorization under 28 U.S.C. §994(n) to devise a mechanism for departures from the Guidelines and below mandatory minimums for defendants rendering substantial assistance. The panel found, however, that the Commission declined to follow Congress' directive in §994(n) by limiting these departures down to, but not below, mandatory minimums. Instead, the panel ruled that §3553(e)'s motion requirement was left unaffected and that a second government application for departure below mandatory minimums is necessary. This decision accorded with that of the Eighth Circuit but diverged from the Second, Fourth, Fifth and Seventh.[1]

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[1] The decision below accords with the Eighth Circuit decision in *United States v. Rodriguez-Morales*, 958 F.2d 1141 (CA8), *cert. denied*, 113 S.Ct. 375 (1992), but diverges from *United States v. Ah-Kai*, 951 F.2d 490 (CA2, 1991); *United States v. Wade*, 995 F.2d 169 (CA4 1992); *United States v. Beckett*, 996 F.2d (CA5, 1993); *United States v. Wills*, 35 F.3d (CA7, 1994) and *United States v. Keene*, 933 F.2d 711 (CA9, 1991).

On November 6, 1995, this Court granted the petitioner's Petition for Certiorari. Petitioner remains incarcerated pending appeal and review by this Court.

SUMMARY OF THE ARGUMENT

(a) In the Sentencing Reform Act of 1984, Congress has decided that defendants who provide substantial assistance in the investigation or prosecution of another individual should be rewarded with lower sentences. Congress has further determined that possible rewards for substantial assistance should include sentencing reductions below statutory minimum penalties.

(i) Congress established a unitary statutory scheme for all substantial assistance departures. Under this system, the government first initiates the process by motion. Then the court, guided by the Commission's written policies, determines the extent of the departure. Under these provisions, the court is granted authority to depart from both a guideline range and a mandatory minimum. Furthermore, once the prosecutor acknowledges that substantial assistance has occurred, the sentencing court has the authority to depart below a statutory minimum if it deems appropriate. Correspondingly, the applicable statutory provisions do not give the prosecutor the power to prevent the court's departure from a statutory minimum simply by declining to cite the enabling statutes. Such an interpretation of the statutory framework would be an evaluation of form over the substance of the statutory language and the congressional

intent to establish a unitary system for substantial assistance departures.

(ii) The two statutes which authorize departures below mandatory minimums for defendants providing substantial assistance. 18 U.S.C. §3553(e) and 28 U.S.C. §994(n). Section 3553(e) provides that "upon motion of the government" the sentencing court is authorized to depart below mandatory minimums when a defendant renders substantial assistance. Section 3553(e) requires, however, that "such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994(n) of title 28, United States Code." Section 3553(e), then, directs that reductions below mandatory minimums be governed by Commission guidelines and policy statements established pursuant to §994(n). Section 994(n), in turn, directs the Commission, in the guidelines and policy statements, to permit lower sentences for defendants who provide substantial assistance "including a sentence that is lower than that established by a statute as a minimum sentence."

(b) The Commission's response to the Congressional mandate in §994(n) is found in U.S.S.G. §5K1.1. Through this policy statement, the Commission created a mechanism for departures from the Guidelines and below mandatory minimums. Incorporating the procedure set forth in §3553(e), the Commission has required that a government motion be brought before the sentencing court can depart from the Guidelines and below mandatory minimums. Thus, the Commission implemented the mandate for a unitary scheme for departures for substantial assistance that requires but a single government

motion to trigger the authority of the sentencing court to depart not only below the Guideline range, but also below any statutory minimum.

(i) The Court has held the guideline commentary is binding if consistent with congressional intent and not a plainly erroneous reading of the guideline. In this case, the three Application Notes to §5K1.1 all support the proposition that the Commission intended §5K1.1 to apply to departures below mandatory minimums. In addition, the commentary to U.S.S.G. §2D1.1 provides further support for the establishment of a guideline mechanism for departures below mandatory minimums under §5K1.1. As Application Note 7 to §2D1.1 states, mandatory minimums may be "waived and a lower sentence imposed under § 5K1.1 where a defendant renders substantial assistance".

(ii) In the lower court, the majority opinion of a three-judge panel found that the Commission, ignoring Congress' mandate in §994(n), limited the authority of §5K1.1 to departures from a guideline range. The panel found that a second, separate government motion must be brought under §3553(e), else the sentencing court is barred from departing below a statutory minimum term. In reaching this result, the panel misread the language and purpose of relevant Commission policy statement and commentary. Therefore, the Third Circuit opinion in *Melendez* should be reversed.

(iii) The unitary scheme for a single motion is consistent with the intent of the sentencing Reform Act of 1984. Unlike the Third Circuit dual motion approach, the unitary scheme assures congressional goal of uniformity

and fairness in sentencing by permitting appellate review of district court sentencing determinations in substantial assistance cases. 18 U.S.C. §3742(a)(2). In addition, a balanced relationship in substantial assistance cases between prosecutor and court is maintained. The government is given the critical role of triggering the substantial assistance process by notifying the court by motion that substantial assistance has been rendered by the defendant. The court then has authority to determine the appropriate sentence, including the granting of departure below the guideline range or a statutory minimum term.

ARGUMENT

I. A SINGLE GOVERNMENT MOTION ACKNOWLEDGING THE DEFENDANT'S "SUBSTANTIAL ASSISTANCE" AUTHORIZES A COURT TO DEPART NOT ONLY BELOW THE GUIDELINE RANGE, BUT ALSO BELOW ANY MINIMUM TERM SET BY STATUTE.

By the Sentencing Reform Act of 1984, Congress created the United States Sentencing Commission and charged it with the creation of guidelines and policy statements for courts to use in imposing sentences in all federal criminal cases. Congress also maintained and subsequently expanded a limited number of criminal statutes which contain mandatory minimum penalties. These mandatory minimum penalties generally exist independently of, and indeed, may take precedence over a sentence under the Guidelines.

However, in the Sentencing Reform Act, Congress established one exception to this dual scheme of guideline and mandatory minimum sentences – the "substantial assistance" case. *See Wade v. United States*, 504 U.S. 181, 118 L.Ed.2d 524, 112 S.Ct. 1890 (1992). In this area, Congress enacted two tightly interrelated provisions, 18 U.S.C. §3553(e) and 28 U.S.C. §994(n), which together created a unitary system for permitting sentences lower than both mandatory minimums and guideline derived sentences when a defendant has provided "substantial assistance" to the government in the investigation or prosecution of another person. Under the statutory framework, the prosecutor is given the triggering authority to state whether the cooperation provided by the defendant has amounted to "substantial assistance". However, once that threshold has been crossed, 18 U.S.C. §3553(e) authorizes the court to grant any such departure. Section 994(n) of title 28 has a complementary role. This provision directs the Commission to implement this unitary system for departures, including departures below statutory minimums, through its guidelines and policy statements. Therefore, under this arrangement, once the government notifies the court under U.S.S.G. §5K1.1, the Commission's applicable policy statement, that a defendant has provided substantial assistance, the government's role reverts to an advisory, albeit an important advisory function.[2] It is then within the province of the sentencing court, consistent with the policy statements of

[2] *See* U.S.S.G. §5K1.1, Application Note 3 (requiring the court to give "substantial weight to the government's evaluation of the assistance rendered").

the Commission, to determine the sentence, taking into account the nature and extent of the substantial assistance and all other appropriate sentencing factors.

A. The Applicable Statutes Establish a Unitary Framework for Government Motions and District Court Departures for Substantial Assistance.

The terms of §3553(e) and §994(n) show that a prosecutor's "substantial assistance" motion cannot be framed as to restrict the court to a sentencing decision at or above the level set by a mandatory minimum statute. Interpretation of a congressional enactment begins with the statutory language. *Bailey v. United States*, ___ S.Ct. ___ (1995), slip op. at 6, citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). If not defined by the statute itself, specific words that have no accepted common law meaning among jurists should be given their ordinary or natural meanings. *Smith v. United States*, 113 S. Ct. 2050, 2053 (1993). However, the Court considers not only the "bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey, supra*, ___ U.S. ___ (1995), slip op at 6, citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). This Court begins with presumptions that Congress intended that each term have some meaning and that no terms be treated as mere surplusage whenever possible. *Bailey, supra*, quoting *Ratzlaf v. United States*, 510 U.S. ___ (1994) (slip op. at 5-6). Application of these basic precepts of statutory construction to the tightly interrelated sections of 18 U.S.C.

§3553(e) and 28 U.S.C. §994(n) demonstrates that Congress intended to establish a unitary framework for government motions and district court departures in substantial assistance cases.

1. Pursuant to the Unitary Departure Scheme for Substantial Assistance Cases, §3553(e) Establishes that Departures from both a Guideline Range and a Statutory Minimum be Governed by the Procedures Established by the Commission Pursuant to §994(n).

Section 3553(e) contains two grants of authority. First, it grants to the government the exclusive power to initiate a departure for substantial assistance.[3] *See Wade, supra*. However, this is the only role given to the government. 18 U.S.C. §3553(e) states:

> Upon motion of the government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. *Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.*

(emphasis added)

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[3] This element of 3553(e) does not bear on the question presented by this case. Furthermore, because the Commission tracked this exact statutory language in §5K1.1, (p.s.) there is no conflict between the statute and the guideline on this issue either. See also Part II(A), *infra*.

Nothing in the plain language of §3553(e) suggests that once the prosecutor has triggered the process by making a motion that substantial assistance has occurred, it otherwise can restrict the court's exercise of its authority to depart below a mandatory minimum.

Concomitantly, therefore, once the government motion is made, §3553(e) grants the district court the authority to sentence defendants below a statutory minimum. *Wade, supra,* 504 U.S., at 182. ("Section 3553(e) empowers district court . . . to impose a sentence below the statutory minimum . . . "). However, §3553(e) does not stop there. It directs that its executive and judicial authority be exercised "in accordance with the guidelines and policy statements" of the Commission established pursuant to §994(n). By its terms, §3553(e) requires that both the government and the district court look to the Commission's actions to exercise their respective roles properly in substantial assistance departures cases. Thus, it is clear from §3553(e) alone, that Congress intended a unitary scheme for substantial assistance departures in which the government and the courts operate in conjunction with the Commission for all substantial assistance departures, including those below a mandatory minimum.

2. As Part of the Unitary Substantial Assistance Departure Scheme, §994(n) Grants the Commission the Authority to Establish Guidelines and Policies for Substantial Assistance Departures Below Both a Guideline Range and Statutory Minimums.

Just as §3553(e) cross-references the Commission's powers under 28 U.S.C. §994(n), so too does the text of

§994(n) explicitly relate to the subject matter of §3553(e) – departures below a mandatory minimum based upon substantial assistance.

28 U.S.C. §994(n) states:

> The Commission shall assure that *the guidelines* reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, *including a sentence that is lower than that established by a statute as a minimum sentence,* to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(emphasis added)

The text of §994(n) authorizes the Commission to accomplish two goals. First, this section requires the Guidelines to reflect lower sentences for substantial assistance. Such a directive is similar to other directives in the Commission's overall mandate to create guidelines that are consistent with certain policy objectives.[4] Second, §994(n) directs the Commission to establish guidelines and policy statements that call for departures below mandatory minimums in substantial assistance cases. Such a directive is extraordinarily significant in this statutory scheme. When originally enacted, §994(n) was the only provision in the Sentencing Reform Act that granted the

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[4] *See* 28 U.S.C. §994(h) (guidelines must be at or near the maximum for defendants with specified prior felony record); 28 U.S.C. §994(j) (the guidelines should reflect the appropriateness of a sentence other than imprisonment for many first-time, nonviolent offenders).

Commission authority to override a statutory minimum sentence.[5] In all other contexts, mandatory minimums exist independently, and in fact, trump what would otherwise be the guideline-derived sentence.[6]

This exception to an otherwise parallel system of Guidelines and mandatory minimums clearly indicates Congressional intent that there be a single substantial assistance departure scheme. Furthermore, the grant of authority to disregard statutory minimum terms to the sentencing court and the Commission in their respective roles in the system, clearly indicate that the power to decide the extent of a substantial assistance departure was granted to the sentencing court, as guided by Commission policy, and not to the prosecutor.

---

[5] In 1994, Congress added 18 U.S.C. §3553(f), the so-called "safety-valve" exception which permits, in limited circumstances, the imposition of a guideline sentence below a mandatory minimum for non-violent, low-level narcotics offenders. *See* Section 80001(c) of Pub.L. 103-22. The Commission's application of the safety-valve appears in U.S.S.G. §5C1.2.

[6] U.S.S.G. §5G1.1(b) provides as follows: "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required maximum sentence shall be the guideline sentence." U.S.S.G. §5G1.1(c) further provides

> In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence –
>
> (1) is not greater than the statutorily authorized maximum sentence, and
>
> (2) is not less than any statutorily required minimum sentence.

3. Specific Terms Within 18 U.S.C. §3553(e) and 28 U.S.C. §994(n) Support the Conclusion that the Commission's Guidelines and Policy Statements Were Intended to Apply to Both Guideline Range and Statutory Minimum Departures.

As noted above, it is uncontrovertible that the tightly interrelated, cross-referenced provisions of §3553(e) and §994(n) must be applied together. Furthermore, each provision contains specific terms further demonstrating that Congress intended a unitary approach to substantial assistance departures in which there should be no distinction between the treatment of departures from a mandatory minimum and from a guideline sentence.

First, both sections contain the same definition of "substantial assistance." The "substantial assistance" must have been rendered "in the investigation or prosecution of another person who has committed an offense." Use of identical standards in these two sections is strong evidence that Congress envisioned a unitary structure for substantial assistance departures in which the government would make the motion, and the court would determine the extent of reward for the defendant's cooperation.

Furthermore, the clause in 18 U.S.C. §3553(e) that cross-references the Commission's responsibilities in substantial assistance departures uses three specific terms that also support petitioner's interpretation of these provisions. Section 3553(e) states that substantial assistance departures below a mandatory minimum such sentences shall be "in accordance" with "the guidelines" and "policy statements" of the Commission. Proper parsing of

Congressional intent requires that each term be examined.

Focusing first on "in accordance," Webster's Dictionary defines "accordance" as "conformity" or "agreement." Webster's II New Riverside University Dictionary, 71 (Houghton Mifflen 1984). The Standard Law Dictionary offers the same. Black's Law Dictionary 17 (6th Ed. Nolan & Nolan-Haley 1990) Thus, departures from mandatory minimums under §3553(e) must be "in conformity" with the substantial assistance departure regime established by the Commission pursuant to §994(n). The use of "in accordance" requires much more than mere consistency with the Commission's broad policies for departures that a two-track motions system would entail. Rather, this language should be read as a directive that, while §3553(e) grants power and specific roles to the executive and judiciary in substantial assistance cases, it is the Commission which is charged by Congress to devise the mechanism for the exercise of each branch's respective authority.

The inclusion in §3553(e) of the term, "the guidelines" is also significant within this statutory framework. Under 28 U.S.C. §994(a)(1), the Commission is empowered to write "guidelines" that are for the "use of a sentencing court in determining the sentence to be imposed in a criminal case." "The guidelines," therefore, apply at the act of sentencing by the district court. Quite separately, the Commission is authorized to issue "general policy statements" concerning the "application of the guidelines or any other aspect of sentencing or sentencing implementation" which further the statutory goals of criminal sentences. 28 U.S.C. §994(n) and 18 U.S.C.

§3553(a)(2). In comparison to "the guidelines," policy statements provide overall guidance, but are not necessarily used by the court in imposing sentence.

Following the import of this distinction, §3553(e)'s requirement that a substantial assistance departure from a mandatory minimum under §3553(e) be "in accordance" with a substantial assistance departure from "the guidelines," means that whatever guidelines or policy statements the Commission deems applicable when the court imposes a guideline sentence, must also be used when the case involves a mandatory minimum statute. Only in this way can the term, "the guidelines" be held to have an independent meaning from "policy statements" in §3553(e).[7]

Several related conclusions should be drawn from this analysis of the statutory framework and specific statutory language. First, by drafting the substantially similar and explicitly cross-referenced sections, §3553(e) and §994(n), Congress clearly indicated its intent to establish a unitary substantial departure scheme. Second, under this scheme, it is the Commission to which is delegated the responsibility to create the mechanism to implement all such departures. Third, there is simply no statutory basis from which to infer that Congress intended to permit the prosecutor to restrict the court's power under §3553(e), once the government indicates that substantial

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[7] A contrary reading of §3553(e), which would merely require some general consistency between departures under the guidelines and mandatory minimums would make the inclusion of the term "the guidelines" in §3553(e) superfluous.

assistance has occurred. On the contrary, such an interpretation, which would allow the government to control the court's power under §3553(e) solely based upon the heading or citations in the motion it filed, would be a gross elevation of form over the clear substance and import of the statutory scheme. As noted by the Seventh Circuit in *United States v. Wills*, 35 F.3d 1192, 1196 (CA7, 1994), "Nothing in these tightly interrelated provisions, §994(n) and §3553(e), contemplates the sort of prosecutorial control of the decision of how much a departure is appropriate that the government's position urges."

Finally, only petitioner's interpretation of this statutory framework allows the Court to give meaning to each term in §3553(e). The subsequent action of the Commission pursuant to 28 U.S.C. §994(n) demonstrates that this analysis of Congressional intent is correct, because the Commission's implementation of these provisions comports with the integrated approach to substantial assistance departures from mandatory minimums and guideline sentences.

II. A MOTION UNDER §5K1.1 IS SUFFICIENT TO TRIGGER THE COURT'S POWER TO DEPART BELOW A MANDATORY MINIMUM UNDER 18 U.S.C. §3553(e) BECAUSE U.S.S.G. 5K1.1 IMPLEMENTS CONGRESS' UNITARY SCHEME FOR SUBSTANTIAL ASSISTANCE CASES.

Section 994(n) of Title 28 directs the Commission to implement through its guidelines and policy statements, a mechanism for courts to grant downward departures in recognition of a defendant's substantial assistance to law enforcement effort, including sentences below mandatory

minimums. The Commission's response was the policy statement appearing at U.S.S.G. §5K1.1.[8] Through the text and application notes of §5K1.1, as well as in other relevant areas of the Guidelines, the Commission made clear that §5K1.1 was intended to fulfill the Congressional mandate for a single triggering mechanism for substantial assistance departures. Therefore, it follows that the Commission intended that a government motion under U.S.S.G. §5K1.1 be sufficient to trigger a court's full departure power under 18 U.S.C. §3553(e). This position has been adopted by a majority of the lower courts that have considered this issue, including the Second, Fourth, Fifth, Seventh and Ninth Circuits.[9]

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[8] The Commission's decision to designate the substantial departure provision a policy statement is consistent with both the Commission's overall approach to the Guidelines Manual and with petitioner's argument. By definition, guidelines, which are used by the court in imposing sentence, are designed to capture the typical case and attempt to quantify the significant factors in such cases. Departures, on the other hand, are by definition exceptions to the "heartland" case and once found to exist, return substantial discretion to the court in fashioning an appropriate sentence. Hence, the departure provisions in U.S.S.G. §5K are denominated as policy statements. By choosing to consider substantial assistance a departure, the Commission properly designated §5K1.1 a policy statement. This characterization is also consistent with petitioner's basic argument that Congress intended substantial assistance cases to present a unique circumstance, ill-suited to control by rigid parameters such as the government would create with its two-track motion system.

[9] *See United States v. Ah-Kai*, 951 F.2d 490 (CA2 1991); *United States v. Wade*, 936 F.2d 169 (CA4), *affirmed on other ground*, 504 U.S. 181 (1992); *United States v. Beckett*, 996 F.2d 70 (CA5 1993);

A. By Tracking the Statutory Language of 18 U.S.C. §3553(e), U.S.S.G. §5K1.1 demonstrates that the Commission Intended to Implement a Unitary System for Mandatory Minimum and Guideline Substantial Assistance Departures.

U.S.S.G. §5K1.1 states in pertinent part

> *Upon a motion of the government* stating that the defendant has provided substantial assistance *in the investigation or prosecution of another person who has committed an offense*, the court may depart from the guidelines."

(emphasis added)[10]

As previously stated, both 18 U.S.C. §3553(e) and 28 U.S.C. §994(n) use the same definition of substantial assistance; "substantial assistance in the investigation or prosecution of another person who has committed an offense." In §5K1.1, the Commission also adopted this standard for substantial assistance. As noted by Judge Miner for a unanimous panel in *United States v. Ah-Kai*, 951 F.2d 490, 492 (CA2, 1991), "It is noteworthy that

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United States v. Wills, supra, United States v. Keene, 933 F.2d 711 (CA9 1991). *Cf. United States v. Rodriguez-Morales*, 958 F.2d 1441 (CA8 1992).

[10] Section 5K1.1 goes on to list a non-exclusive number of factors the court may use in determining the extent of any reduction including: the court's evaluation of the significance of the cooperation (and the government's view of this assistance as well), any testimony given by the defendant, any injury or risk of injury to the defendant or his family resulting from his cooperation and the timeliness of the defendant's assistance. The existence of this list of factors further suggests that it is the court, not the prosecutor, who is to determine the extent of the departure.

§5K1.1 and §3553(e) both require a showing of 'substantial assistance' before there can be any sentencing departure from the guidelines or the statutory minimum." As that court recognized, tracking the statutory language is evidence that "5K1.1 implements the directive of 994(n) and 3553(e), and all three provisions must be read together to determine the appropriateness of a sentence reduction and the extent of any departure." *Ah-Kai, supra,* quoting *United States v. Keene*, 933 F.2d 711, 714-15 (CA9 1990). General principles of administrative law also support this conclusion. Where an agency uses the same statutory language in its rules, it should be presumed to have intended to implement the congressional mandate of that statutory provision without any change of meaning. *See generally, United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31-32 (1981); *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472-477 (1979).

Additional language in the text of §5K1.1 demonstrates that the Commission specifically contemplated and undertook in §5K1.1 to create a conduit for the implementation of §3553(e)'s authorization for the district court to depart below a mandatory minimum for substantial assistance. Section 5K1.1 requires that in all substantial assistance cases, a court may depart only, [u]pon a motion of the government." The inclusion of a government motion requirement in all cases is significant because, while §3553(e) requires a government motion for mandatory minimum departures,[11] §994(n) by its terms

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[11] Petitioner points out that §3553(e) does not require that the motion be made under §3553(e). Rather, as discussed earlier, it requires that such a sentence be imposed "in accordance" with

does not. While §994(n) authorizes the Commission to establish a procedure for lower sentences for substantial assistance (including those below a mandatory minimum), there is no language that a government motion be a condition precedent. In other words, a technical reading of §994(n) would have permitted the Commission to create a guideline or policy statement under which no government motion is necessary to authorize a court to depart downward for substantial assistance, so long as the departure did not breech the statutory minimum.[12] Thus, the ultimate import of this difference in the statutes is that, at most, the Commission could have drafted a policy statement in which a government motion would be required for a departure from the statutory minimum but would not be necessary for a departure from a guideline range.

However, the Commission did not create such a two-tier departure mechanism. Instead, it created a single policy statement which tracks the government motion requirement of §3553(e). By choosing to include the government motion language from §3553(e), the Commission has stated in the clearest terms that it intended to create a unitary scheme, designed to implement substantial assistance departures from both statutory minimums and

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the guidelines and support statements of the Commission; supporting the argument that a motion under §5K1.1 triggers the court's power under §3553(e).

[12] Section 994(n), of course, is still subject to the government motion requirement of §3553(e) in mandatory minimum cases.

guideline sentences under the authority of both §3553(e) and §994(n).[13]

B. THE RELEVANT APPLICATION NOTES TO §5K1.1 DEMONSTRATES THE COMMISSION'S INTENT THAT THIS POLICY STATEMENT APPLY TO BOTH MANDATORY MINIMUM AND GUIDELINE SENTENCES.

Section 5K1.1 is followed by three application notes. Each of these notes demonstrates the Commission's understanding that §5K1.1 motions cover both mandatory minimum and guideline departures for substantial assistance. Guideline commentary, including application notes, is included "to help the courts interpret the intent and meaning of the guidelines." *Ah-Kai, supra,* 951 F.2d at 493. *See* U.S.S.G. §1B1.7. The Court held in *Stinson v.*

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[13] This point was noted but not addressed in *Wade, supra,* because the Petitioner there did "not argue otherwise." *Id.*, 504 U.S. at 185. The comparison of this hypothetical two-tier departure guideline with the actual language of §5K1.1 is a tool for examining the intent of the Commission. Petitioner asserts that the choice to include the government motion language of §3553(e) in §5K1.1 is one further example of the Commission's thorough effort to implement a unitary statutory scheme for substantial assistance departures under which §5K1.1 served as the conduit for departures from both mandatory minimums and guideline sentences. However, Petitioner notes that nothing in this argument necessarily would deny the Commission the authority, if it so chose, to create such a two-tier substantial assistance guideline under which a government motion would be required to depart below a mandatory minimum but no government motion would be required to depart below a guideline range.

United States, 113 S.Ct. 1913, 1918 (1993), that commentary in the Guidelines Manual, "which functions to interpret a guideline or explains how it is to be applied controls." Under *Stinson*, the Commission's interpretation of §5K1.1 is binding, because it is consistent with congressional intent, not violative of the Constitution and not a plainly erroneous reading of §5K1.1 *Id.* at 1919.

1. Application Note 1's Cross-Reference to Judicial and Commission Power to Depart Below a Statutory Minimum Demonstrates that §5K1.1 was Intended to Apply to Mandatory Minimum Cases.

Application Note 1 to U.S.S.G. §5K1.1 states:

> Under circumstances set forth in 18 U.S.C. §3553(e) and 28 U.S.C. §994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

Application Note 1 explicitly cross-references the application of §5K1.1 to the court's statutory authority to depart below a mandatory minimum, and the Commission's statutory authority under §994(n) to create a mechanism for a departure below a mandatory minimum. Under U.S.S.G. §1B1.7, the first function of commentary is to "interpret the guideline or explain how it is to be applied." Thus, the natural reading of Application Note 1 is that §5K1.1 was intended to be applied to cases that fall under §3553(e) and §994(n), which, of course, include

departures below a mandatory minimum.[14] This is the interpretation given to this note by the majority of federal circuits that have considered the question. For example, the Second Circuit concluded in *Ah-Kai, supra*, 951 F.2d at 493, that "[t]he inclusion of this note signifies that §3553(e) was contemplated when §5K1.1 was drafted and leads to the conclusion that the Sentencing Commission intended that §5K1.1 serve as a conduit for the application of §3553(e)." *See also Keene, supra*, 933 F.2d at 714; *United States v. Beckett*, 996 F.2d at 72. Reading the text of

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[14] The Commission states in §1B1.7 that commentary serves a variety of functions including: interpreting or applying a guideline, setting forth circumstances that may warrant departure, or as background information on the reasons for the promulgation of the guideline. Accordingly, commentary in the Guidelines Manual is divided into "Application Notes" and "Background" and these headings distinguish, for the most part, the intent of the Commission in issuing the particular commentary. Most application notes are the "nuts and bolts" of the commentary which are intended to be applied in individual cases. Most "Background" tends to more general, policy oriented and is used to provide the rationale behind the guideline. *Compare* U.S.S.G. §4B1.3, Application Notes 1-2 (define terms within U.S.S.G. §4B1.3), Background (explains purpose of §4B1.3). *See also* Application Notes and Background in U.S.S.G. §1B1.9, §5C1.2, §5F1.2.

In this context, it is significant that the Commission chose to place its commentary on the relationship between §3553(e) and §5K1.1 in an application note. By using an application note, the Commission signaled that the information therein is to "be applied" to cases falling under §5K1.1. If the Commission had simply intended to note the existence of a separate section of the U.S. Code that applied to a distinct and unrelated set of substantial assistance cases, it would have been more appropriate to have included a reference to §3553(e) and §994(n) in the "Background" portion of the Commentary to §5K1.1.

§5K1.1, together with Application Note 1, demonstrates that the Commission properly implemented its mandate in §994(n) to draft a policy statement to cover substantial assistance departures from mandatory minimums.

2. Application Notes 2 and 3 to §5K1.1 Also Suggest that §5K1.1 Was Intended to Apply to Mandatory Minimum Departures for Substantial Assistance.

Section 5K1.1, Application Note 2 states in pertinent part

> The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility.

(emphasis added)

The significant language of Application Note 2 in this context is the use of the broad phrase "sentencing reduction." The term "sentencing reduction" is open enough to include reductions below a mandatory minimum as well as from a guideline range. In comparison, in the immediately subsequent section, §5K2.0, *Grounds for Departure* (Policy Statement), the Commission chose much more restrictive language in the commentary to describe the impact of a departure on the sentence.[15] In §5K2.0, Commentary, the Commission twice described this departure as only "a departure from the guideline range."

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[15] Section 5K2.0(p.s.) implements the mandate of 18 U.S.C. §3553(b), which contains no authority for departure from a mandatory minimum statute.

In the context of this statutory framework, the combined choice of language in the Application Notes 1 and 2 was held to be significant by the Ninth Circuit panel in *Keene, supra*. The court remarked that "although 5K1.1 speaks initially in terms of 'departures' from the guidelines, section 994(n) and the Application Notes to 5K1.1 refer more generically to 'sentence reductions' and specifically refer to reductions below the statutory minimum as provided by 3553(e)." *Id.*, 933 F.2d at 714. In other words, by the overt reference to the greater statutory authority of §3553(e) in Application Note 1 and the use of 'sentencing reduction' in Application Note 2, the Commission reveals its understanding that §5K1.1 is the mechanism for implementing all substantial assistance departures.

The third Application Note to §5K1.1 also supports this interpretation. This note provides:

> Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Application Note 3 explicitly states that the court should give substantial weight to the government's evaluation of the defendant's cooperation. Implicitly, however, Application Note 3 is premised, and in fact only makes sense, based on the assumption that the court retains full discretionary power over the extent of the sentencing reduction.

If the Commission thought that the government retained the power to decide whether the court could

depart below a mandatory minimum, there would be little need for Application Note 3, as the government would already hold the key to the most significant aspect of a substantial assistance departure in most cases.[16] Furthermore, one would also naturally expect that the application note(s) would refer to the government's power here to impose its will on the extent of departure by the type of motion it filed in the case. However, the application notes are silent, suggesting that the Commission intended no such radical interpretation of the statutory scheme. This interpretation of Application Note 3 was employed by the Seventh Circuit in affirming the power of the district court to sentence below a mandatory minimum upon a government motion solely under §5K1.1. In *United States v. Wills*, 35 F. 3d at 1196, Judge Ripple states that "[t]his application note, although making it clear that it is the duty of the court, not the prosecutor, to determine the extent of departure, also

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[16] The large majority of substantial assistance cases fall under mandatory minimum statutes, particularly narcotics cases. United States Sentencing Commission, 1994 Annual Report 86 (Table 74); United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Justice Systems 10 (1994). Because the Guidelines generally use the mandatory minimum as the floor for the guideline range, more often than not, the most significant benefit of cooperation is relief from the mandatory minimum, not from the guideline range. Furthermore, to allow the government, at its own discretion, to restrict substantial assistance departures to the guideline range would unnecessarily and unfairly restrict the relief that Congress created for cooperating defendants and usurp the role of the district courts to provide that relief. *See Ah-Kai, supra*, 951 F. 2d at 494.

makes it clear that the court ought to hear the government. . . . "

Taken as a whole, the text of §5K1.1 and each of its applications notes present a uniform picture of the Commission's intent in promulgating this policy statement – §5K1.1 was intended to be the sole means for implementing the statutory authority of a court and the Commission to reward defendants for providing substantial assistance in federal criminal cases, regardless of whether the crime fell under a mandatory minimum or only implicated a guideline sentence.

3. The Commentary to U.S.S.G. §2D1.1 Supports the Conclusion that the Commission intended §5K1.1 to Establish a Guideline Mechanism for Substantial Assistance Departures Below a Mandatory Minimum.

U.S.S.G. §2D1.1 is the primary offense guideline for drug trafficking cases under 18 U.S.C. §841. Section 841(b) contains various mandatory minimum penalties based on varying weights of eight types of controlled substances. The vast majority of federal cases that involve both mandatory minimum penalties and substantial assistance departures involve narcotics, and hence, involve application of §2D1.1.[17]

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[17] See United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, 19(1991) (suggests that over 90% of mandatory minimum sentences might be attributable to three drugs covered by §841 and 18 U.S.C. §924(c) (which penalizes firearm use in crimes of violence and drug trafficking cases)).

In recognition of the confluence of mandatory minimums and departures in narcotic trafficking offense, the Commission promulgated Application Note 7 to §2D1.1, which states in pertinent part:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived", and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. §994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense". *See* §5K1.1 (Substantial Assistance to Authorities).

Once again, the Commission's choice of language in an application note reveals its intent that §5K1.1 cover mandatory minimum penalties. Here, after the Commission states that a mandatory minimum may be waived, its cites to §5K1.1 without citing to 18 U.S.C. §3553(e). The only rational interpretation of this citation, since the Commission alone does not have the authority to waive a mandatory minimum, is that the Commission understands §5K1.1 to be the conduit through which §3553(e) is applied. *See Ah-Kai, supra,* 951 F.2d at 493 ("This Commentary supports the contention that the Sentencing Commission perceives §5K1.1 as covering departures both from 'mandatory (statutorily) minimum' sentences and from the guidelines."); *Beckett, supra,* 996 F.2d at 72; *accord, United States v. Rodriguez-Morales,* 958 F.2d 1441, 1448 (CA8 1992) (Heaney, J. dissenting).[18]

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[18] As noted above, the inclusion of Note 7 in §2D1.1 is rational because the vast majority of substantial assistance departures from mandatory minimums occur in narcotics cases. Therefore, it is of no import that Note 7 is not repeated in §5K1.1 The Guidelines are replete with cross-references and these cross-references "are a central part of the guidelines scheme." *Rodriguez-Morales supra,* 958 F.2d at 1448 (Heaney, J. dissenting).

In conclusion, there is strong evidence throughout the Guidelines Manual that the Commission sought to implement the mandate of Congress to create a unitary system for substantial assistance, and therefore, that it was intended that a government motion under §5K1.1(p.s.) be sufficient to invoke the court's power to depart below a mandatory minimum.[19]

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[19] Given this clear interpretation by the Commission of the statutory intent, even if the Court finds some ambiguity to statutory framework, the Court should defer to the Commission's interpretation of the statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984) (because some agency interpretations of statutes amount to policy decisions, federal court must accept that reading of the statute under some circumstances); see also *United States v. Shabazz,* 933 F. 2d 1029, 1035 (D.C. Cir.), (Thomas, J.) *cert. denied,* 502 U.S. 964 (1991) (invoking the *Chevron* doctrine in upholding sentencing guidelines challenged as inconsistent with a sentencing statute). Even if *Chevron* does not strictly compel the Court to accept any reasonable reading of the statute, the Court shall at least presumptively favor the Commission's interpretation of its statutory framework here, even if it is not strictly binding.

C. THE THIRD CIRCUIT'S ANALYSIS OF THE APPLICABLE STATUTES AND GUIDELINE COMMENTARY IS CONTRARY TO CONGRESSIONAL INTENT AND RENDERS PORTIONS OF THESE PROVISIONS SUPERFLUOUS.

The majority opinion of the panel in the Third Circuit below erred in its interpretation of both the statutory framework and the relevant guidelines and commentary in coming to its conclusion that a §5K1.1 motion does not trigger the court's departure authority under §3553(e) unless the statute is specifically cited and invoked. Furthermore, its analysis is contrary to congressional intent that substantial assistance cases be treated similarly and it renders terms with the applicable statutes and guidelines superfluous.

With regard to the applicable statutes, the panel argues that §3553(e) gives the prosecutor the "sole key" to substantial assistance departures and that nothing in §994 authorizes the Commission to take back that key in the Guidelines. *Melendez, supra,* 55 F. 3d at 134. This argument misreads the critical section of §3553(e) that requires that mandatory minimum departures for substantial assistance be "in accordance" with the guidelines. The Third Circuit sees these two sections as competing, or perhaps conflicting, when in actuality, the cross-references require they should be read together.

In its interpretation of the Commission's intent in promulgating §5K1.1, the Third Circuit panel in the instant case erred because it focused solely on one clause in the text of §5K1.1 which states that this policy statement applies to "departures from the guidelines". The

court reasoned that because §3553(e) states that it applies to substantial assistance departures from "mandatory minimums," this difference must represent "an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by §3553(e)." *Id.* at 135.

In a vacuum, the fact that §5K1.1 and §3553(e) differ in this respect might have significance. However, a review of the applicable statutes and guideline commentary reveals that an interpretation born of this myopic focus cannot be correct.

First, this analysis ignores the fact that §994(n) specifically directs the Commission to draft a provision that covers substantial assistance cases, including mandatory minimums. To accept this analysis, then, one must conclude that the Commission did not comply with its congressional mandate.[20] Given the alternate and reasonable interpretation that the Commission did intend §5K1.1 to cover mandatory minimum departures, the Court should choose the interpretation of agency action that is fully consistent with the enabling statute.

Second, the Third Circuit ignores the three application notes to §5K1.1, each of which suggests that the

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[20] Indeed, in *Rodriguez-Morales, supra,* the Eighth Circuit case that *Melendez* purports to follow, the court there acknowledged that the Commission had the power but "In spite of section 994(n), the Commission has not provided for departures below the mandatory minimum sentence in the plain language of section 5K1.1." 958 F.2d at 1443.

Commission understood §5K1.1 to cover mandatory minimum cases. In particular, the majority opinion does not even attempt to deal with Application Note 1 which invokes the statutory authority of §3553(e) and §994(n).[21] Similarly, the opinion fails to consider the other relevant guidelines commentary in Application Notes 2 and 3 to §5K1.1 and §2D1.1, Application Note 7.

Given the clear congressional intent that the Commission implement a unitary system for substantial assistance departures, it is an elevation of form over substance to conclude that the Commission implicitly intended in §5K1.1 to create a two-tier substantial assistance mechanism that requires different motions by a prosecutor or a motion with two citations of authority, to allow a court to depart from the guidelines or a statute based solely on the absence of the words "mandatory minimum" from the text of §5K1.1. This is particularly absurd when there are at least two reasonable explanations for why the

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[21] The contrary holding in the Eighth Circuit in *Rodriguez-Morales, supra*, at least attempted to explain this application note by suggesting that this note "is little more than an academic observation that, under the circumstances set forth in sections 994(n) and 3553(e), 'a sentence below the statutorily required minimum sentence' may be justified". 958 F.2d at 1443. The Eighth Circuit's suggestion that Application Note 1 is an "academic observation" is somewhat disingenuous. Commentary, particularly application notes, are intended by the Commission to be applied by courts in imposing sentence under the guidelines. See U.S.S.G. §2B1.7 Thus, to the extent that the Commission might make "academic observations" at all, it would include such comments in a "background commentary" section rather than an application note. Furthermore, both *Melendez* and *Rodriguez-Melendez* ignore the import of Application Notes 2 and 3 as discussed in Part II (B)(2), *supra*.

Commission chose to explain the relationship between §5K1.1 and mandatory statutes in the application notes.

First, in general, the text of the guidelines and policy statements are written to cover the "heartland" case. United States Sentencing Commission, *Guidelines Manual*, Chapter 1, Part 4(b). Background and application notes are then used to explain how to apply the guideline in the more unusual or atypical case or to determine if a departure is warranted. *E.g.*, U.S.S.G. §1B1.7; §2D1.1 Application Note 12 (estimating drug quantity when no drugs are seized); Note 17 (downward departure warranted when government agents manipulate drug quantity in a "reverse sting"). In this context, despite the absolute number of drug and gun indictments in the federal courts in recent years, the number of mandatory minimum statutes is still a fraction of the criminal penalty provisions in the U.S. Code. Therefore, in devising a Guideline system that primarily metes out guideline-derived sentences, it was reasonable for the Commission to refer to "the guidelines" in the text of §5K1.1 and to consider the unusual instance of a mandatory minimum substantial assistance departure in Application Note 1. In any event, by virtue of U.S.S.G. §5G1.1(b) and (c), mandatory minimum statutory provisions are incorporated into the guidelines. Thus, a departure below a mandatory minimum term is departure "from the guidelines" for many cases.[22]

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[22] As Judge Heaney wrote, dissenting, in *Rodriguez-Morales*, 958 F.2d at 1148, "Many of the Guidelines are skeletal provisions for which commentary provides crucial supplementation." (quoting *U.S. v. Kelley*, 956 F. 2d 748, 756 (CA8 1992) (en banc)).

Similarly, the Congressional directive to the Commission in §994(n) was anomalous. With the exception of substantial assistance departures, the Commission's original enabling legislation did not authorize downward departures from mandatory minimums. Therefore, one will not otherwise find in the text of the guidelines or policy statements any reason to refer to mandatory minimums. Thus, it is not surprising that the Commission maintained this division in the text of §5K1.1 and relegated to the application notes, an explanation of this unique situation.[23]

Given the clear congressional intent, the Commission's explanation of its understanding of §5K1.1 in the application notes, and a reasonable explanation for the omission of the term "mandatory minimum" from the text of §5K1.1 there is no support for the Third Circuit's approach to this issue. Furthermore, as discussed in the next section, the interpretation of §5K1.1 advanced by petitioner is also consistent with the broader policy objective of the Sentencing Reform Act of 1984.

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[23] To some extent, the Commission's choice of language may also reflect a reticence to test the outer limits of its powers. As the court noted in *Stinson, supra*, 113 S.Ct. at 191, in examining the weight to be given to guideline commentary, "It is perhaps ironic that the Commission's own commentary fails to recognize the full significance of interpretive and explanatory commentary."

D. DELEGATION OF THE DECISION TO DETERMINE THE IMPACT OF ANY SUBSTANTIAL ASSISTANCE ON THE SENTENCE TO THE COURT IS CONSISTENT WITH THE INTENT OF THE SENTENCING REFORM ACT OF 1984.

1. Allowing Prosecutors to Make Unreviewable Sentencing Decisions in Substantial Assistance Cases Will Increase Sentencing Disparity.

A critical goal of the Sentencing Reform Act of 1984 was to reduce sentencing disparities among similarly situated defendants. 28 U.S.C. §991. To accomplish this goal, Congress not only created the Commission and the Guidelines, it also imposed additional duties on the lower courts to promote and enforce uniformity and fairness. In addition to employing the guidelines and policy statements of the Commission in sentencing, a district court is also now required in most cases to give a statement of reasons for the particular sentence imposed, even when the sentence is within the guideline range. 18 U.S.C. §3553(b) & (c). Furthermore, district court sentences under the guidelines can be appealed by the defendant or the government, for *inter alia*, "an incorrect application of the guidelines" or if sentence represents a departure above or below the guideline range. 18 U.S.C. §3742(a)(2), (3) & (b)(2), (3).

These provisions promote uniformity and fairness because they bring the court's sentencing decisions into the public domain and subject such decisions to both appellate and public scrutiny. Other provisions, including §3553(e) and §994(n) should be interpreted consistent with these goals. Permitting the district court alone to

determine the extent of a substantial assistance departure, once the government indicates there has been substantial assistance, clearly promotes these goals. The court's reasoning becomes part of the record and is subject to judicial review. In addition, the Commission is provided with additional data which it is obligated to analyze and publish to Congress and the public to facilitate additional legislative reform. *See* 28 U.S.C. §995(12-16).

By contrast, an interpretation that allocates to the government power over the "substantial assistance" triggering mechanism and the critical decision to depart below a statutory minimum will frustrate these stated goals of the Sentencing Reform Act. First, in the absence of an unconstitutional motive, a prosecutor's decision not to file a substantial assistance motion, or a particular type of substantial assistance motion is unreviewable. *Wade, supra*. Furthermore, such decisions are routinely made internally, and there is no discovery mechanism to force the prosecutor to provide any reasons. This secretive, unreviewable system is much more likely to produce arbitrary results and increase sentencing disparities. Thus, promotion of the Sentencing Reform Act's salutary policies is another reason to reject the government's forced reading of the applicable statutes.

2. Explicit Legislative Language is Needed to Support a Significant Transfer of Sentencing Power from the Courts to the Prosecutor.

Traditionally, courts were entrusted with significant power to determine sentences. *Roberts v. United States*, 445 U.S. 552 (1980); *Williams v. New York*, 337 U.S. 241 (1949). Prosecutors were entrusted with the power to determine the charges. The Sentencing Reform Act made selective and explicit alterations to this existing system. As noted above, courts now must employ the Sentencing Guidelines in imposing sentence. However, courts still retain all other traditional sentencing powers within this framework. For example, a court may sentence a defendant outside the guideline range under appropriate circumstances, 18 U.S.C. §3553(b), without limitation as to the information that the court may consider. 18 U.S.C. §3661; 21 U.S.C. §850.

Furthermore, Congress knew how to adjust the relationship between the prosecutor and the court. Section 3553(e) explicitly grants the power to initiate a departure from the mandatory minimum to the prosecutor. However, nothing in §3553(e) suggests that any other traditional sentencing powers of the court have been transferred to the executive branch, including the extent of such a departure. As noted in *Keene, supra*, to accept the government's assertion that the government controls the extent of a substantial assistance departure by the type of motion it files, one would have to find that:

> Congress intended to vest with the prosecutor not only the authority to make the motion, but also the authority to set the parameters of the

court's discretion. There is nothing in the legislative history, nor the language of §3553 that suggested such a result.

993 F.2d at 714.

Therefore, in the absence of specific language or other indicia of legislative intent, this Court should not presume that Congress intended to transfer any additional judicial power to the prosecutor.[24]

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[24] The view that prosecutors should retain control over the extent of a substantial assistance departure is rooted in the government's implicit mistrust of any judicial discretion in cases involving mandatory minimum statutes. This view has no statutory basis and is unwarranted as a policy matter. As the majority of lower courts have noted, while a prosecutor is "in the best position to know whether defendant's cooperation has been helpful . . . [t]he extent of that assistance and its impact on the sentence are matters left within the sound discretion of the sentencing judge." *Keene, supra,* 933 F.2d at 714; *Ah-Kai, supra,* 951 F.2d at 494 (quoting *Keene*). While it is true that as a statutory exception, the various mandatory minimum penalties are generally immune to judicial sentencing discretion, §3553(e) explicitly erases this distinction. Therefore, there are no statutory or policy reasons to deny courts their normal function in setting an appropriate sentence. At its heart, the contrary position is most likely based on an unstated assumption that because many federal judges have expressed dissatisfaction with mandatory minimums, some will use substantial assistance cases to subvert mandatory minimum penalties. *See Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra,* at 93-96. Neither this argument nor its underlying assumptions have any legitimacy.

E. IF ANY DOUBT REMAINS AS TO THE PROPER CONSTRUCTION OF 18 U.S.C. §3553(e), 28 U.S. §994(n) AND U.S.S.G. §5K1.1, THAT DOUBT MUST BE RESOLVED IN FAVOR OF LENITY.

As a last resort, if the court is not sure of the proper construction of the statutory sentencing scheme involved in this case, that doubt must be resolved in favor of lenity. *Bifulco v. United States,* 447 U.S. 381 (1980); *Busic v. United States,* 446 U.S. 398, 406-07 (1980). In the present context, the rule of lenity requires that mandatory minimum sentencing statutes be given a strict and narrow construction. In this way, judicial discretion will be preserved, to the extent possible, to select a sentence which in each case is "sufficient, but not greater than necessary" to achieve the purposes of sentencing established by law. 18 U.S.C. §3553(b).

CONCLUSION

Based upon the foregoing, petitioner prays that the Court of Appeals' ruling be reversed, sentence vacated, and this matter remanded to the district court for resentencing.

Respectfully submitted,

PATRICK A. MULLIN, Esq.
Attorney for Petitioner
Court Plaza North
Suite 200
25 Main Street
Hackensack, New Jersey
07601
Telephone: (201) 487-9282

Of Counsel:
DAVID ZLOTNICK
PETER GOLDBERGER

18 U.S.C. 3553(e)

* * *

(e) Limited authority to impose a sentence below a statutory minimum. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

* * *

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28 U.S.C. 994(n)

* * *

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

* * *

United States Sentencing Guidelines, Section 5K1.1

PART K – DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. *Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.*

2. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.*

3. *Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.*

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significant of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 290).

§5K1.2. Refusal to Assist (Policy Statement)

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 291).

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21 U.S.C. 841(b)(1)(A)

* * *

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers: or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of

imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

No. 95-5661

In the Supreme Court of the United States

OCTOBER TERM, 1995

JUAN MELENDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
WAN J. KIM
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a district court has authority to impose a sentence below the statutory minimum, when the government files a motion under Sentencing Guidelines § 5K1.1 for a downward departure from the applicable Guidelines range, but does not request a sentence below the statutory minimum pursuant to 18 U.S.C. 3553(e).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 22-38) is reported at 55 F.3d 130.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. A petition for rehearing was denied on June 27, 1995. The petition for a writ of certiorari was filed on August 15, 1995, and certiorari was granted on November 6, 1995. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to possess cocaine

with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. J.A. 16, 18. The court of appeals affirmed. *Id.* at 22-38.

1. In the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, Congress established mandatory minimum sentences for trafficking in controlled substances, including cocaine. See 21 U.S.C. 841(b) (1988 & Supp. V 1993). A person who distributes or conspires to distribute five kilograms or more of cocaine is subject to a mandatory minimum sentence of ten years' imprisonment. 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993). In the same Act, Congress provided a mechanism for relief from the statutory mandatory minimum sentence when the government files a motion requesting that action for a defendant who cooperates in the investigation or prosecution of others. 18 U.S.C. 3553(e). Section 3553(e) states:

> **Limited Authority To Impose A Sentence Below A Statutory Minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

In addition, Congress directed the Sentencing Commission to address the issue of substantial assistance in the Sentencing Guidelines:

> The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

28 U.S.C. 994(n).[1]

Exercising its authority under Section 994(n), the Commission issued Guidelines § 5K1.1, which states:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

Section 5K1.1 also sets forth a series of factors that the district court must consider in determining the extent of the departure. See Guidelines § 5K1.1(a).

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[1] At the same time, Congress amended Fed. R. Crim. P. 35(b), to provide authority for a court to reduce a previously imposed sentence to reflect a defendant's substantial assistance:

> The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. * * * The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

Application note 1 to Section 5K1.1 explains the relationship between Section 5K1.1 and 18 U.S.C. 3553(e). It states that "[u]nder circumstances set forth in 18 U.S.C. 3553(e) and 28 U.S.C. 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence."

2. In September 1992, confidential informants advised officials of the United States Customs Service in Miami, Florida, that petitioner and Edward Moya were interested in transporting cocaine to the New York area. PSR 4.[2] Posing as importers and transporters of cocaine, the informants held a series of meetings with petitioner and Moya. *Id.* at 4-5. An agreement was finally reached under which the confidential informants would deliver 225 kilograms of cocaine to petitioner and Moya in three 75 kilogram installments. *Id.* at 5. In return, petitioner and Moya agreed to pay the transportation costs for the deliveries. *Ibid.* The transportation costs for the first 75 kilogram delivery were $450,000. Petitioner and Moya gave the confidential informants deposits totalling $12,500 for that delivery. *Id.* at 5-6.

Before delivery could be made, petitioner and Moya were arrested by New York authorities on unrelated drug charges. PSR 6. Moya turned over responsibility for completing the cocaine transaction to his common law wife, Anna Maria Ferrera, and she, her brother, Raphael Ferrera, and her uncle, Bienvenido Polanco, met with the confidential informants for that purpose. *Id.* at 5-6. Raphael Ferrera and Polanco

[2] PSR refers to the Presentence Report. The district court adopted the findings in that report. J.A. 20.

ultimately agreed to accept delivery of the cocaine, and government agents made a controlled delivery to them of 30 kilograms of cocaine. *Id.* at 7.

Petitioner was charged with conspiring to distribute and conspiring to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846. J.A. 24. Under 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993), that offense carries a mandatory minimum sentence of ten years' imprisonment. Following plea negotiations, petitioner signed a plea agreement. J.A. 4-12. The agreement provided that petitioner would plead guilty to conspiring to possess with intent to distribute more than five kilograms of cocaine and cooperate with the government's investigation of other persons involved in drug trafficking. *Id.* at 4-5. In return, the government agreed that, if petitioner provided substantial assistance in the investigation or prosecution of one or more persons who have committed offenses, the government "will move the sentencing court, pursuant to Section 5K1.1 of the Sentencing Guidelines, to depart from the otherwise applicable guideline range." *Id.* at 9. The parties stipulated that the applicable Guidelines range for petitioner's conduct should be based on his having trafficked in 50 to 150 kilograms of cocaine. *Id.* at 12. The agreement specifically noted that the offense to which petitioner would plead guilty "carries a statutory mandatory minimum penalty of 10 years' imprisonment." *Id.* at 6. The government did not agree to request a sentence below the statutory minimum. See *id.* at 4-12.

Petitioner pleaded guilty to the charged conspiracy. J.A. 24. The presentence report determined petitioner's offense level based on a finding that he had trafficked in 75 kilograms of cocaine, the amount

involved in the first installment. PSR 9. After crediting petitioner with an adjustment for acceptance of responsibility and a timely plea, the presentence report determined that petitioner's offense level was 33. *Ibid.* When combined with petitioner's criminal history category, that led to a Guidelines range of 135-168 months' imprisonment. *Id.* at 12.

Noting that petitioner had met with government officials four times and had answered all questions and that petitioner had provided assistance to the government, the government moved, pursuant to Guidelines § 5K1.1, for a reduction in petitioner's sentence below that "otherwise applicable under the sentencing guidelines." J.A. 13-14. The government did not request a sentence below the statutory minimum. *Ibid.*

The district court granted the government's Section 5K1.1 motion and departed downward from the Guidelines range by sentencing petitioner to the mandatory minimum sentence prescribed by 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993) of 120 months' imprisonment. J.A. 25. The court concluded that it had no authority to depart below the statutory minimum because the government had not requested such a departure pursuant to 18 U.S.C. 3553(e). J.A. 25.

3. The court of appeals affirmed. J.A. 22-38. It held that "a motion under [Sentencing Guidelines] § 5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum." *Id.* at 32-33. The court noted that the text of 18 U.S.C. 3553(e) authorizes a sentence below the statutory minimum only upon motion of the government. J.A. 27-28. By requiring a government motion, the court reasoned,

Congress "gave the prosecutor the sole key that affords access to a sentence below a statutory minimum." *Id.* at 28.

The court noted that 28 U.S.C. 994(n) gives the Sentencing Commission the responsibility to assure that the Guidelines reflect the principle that substantial assistance can lead to a reduced sentence, including a sentence below the statutory minimum. J.A. 28-29. The court concluded, however, that "nothing in the text of § 994(n) suggests that Congress intended by the passage of § 994(n) to take back the access key given to the prosecutor in § 3553(e)." *Id.* at 29.

The court also rejected petitioner's argument that Guidelines § 5K1.1 permits a departure below the statutory minimum once the government states that the defendant has provided substantial assistance. The court concluded that "the sole authority granted in § 5K1.1 is for departures 'from the guidelines.'" Nor was the court persuaded by petitioner's reliance on application note 1 to Section 5K1.1. The court concluded that the note's reference to 18 U.S.C. 3553 as the source of authority for departures from statutory minimums shows that the Commission made "an advertent decision * * * to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e)." J.A. 30.

Judge Huyett dissented. J.A. 35-38. He concluded that the Commission intended for Section 5K1.1 to serve as a conduit for the application of Section 3553(e), and that the district court therefore had discretion to depart below the statutory minimum once the government filed a motion under Section

5K1.1. *Ibid.* A petition for rehearing was denied, with six judges dissenting.

SUMMARY OF ARGUMENT

The question in this case is whether a district court has authority to impose a sentence below a statutory minimum, when the government files a motion under Guidelines § 5K1.1 for a downward departure from the applicable Guidelines range, but does not request a sentence below the statutory minimum pursuant to 18 U.S.C. 3553(e). The answer to that question is supplied by the text of Section 3553(e).

I. Under 18 U.S.C. 3553(e), a court has authority to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance only "[u]pon motion of the Government" for such a departure. A government motion for a departure from the applicable Guidelines range under Guidelines § 5K1.1 based on a defendant's substantial assistance does not automatically entail a request for a sentence below the statutory minimum. Accordingly, absent a motion that invokes the court's authority under Section 3553(e), a sentencing court has no authority to impose a sentence below the statutory minimum.

That construction of Section 3553(e) is supported by *Wade* v. *United States*, 504 U.S. 181 (1992). In *Wade*, the Court held that even when the defendant has provided substantial assistance, the government has discretion under Section 3553(e) to refuse to move for a reduced sentence based on its assessment of the costs and benefits that would flow from such a motion. A holding that a motion for a departure from the Guidelines range based on the defendant's substantial assistance also waives the mandatory minimum would

usurp the government's discretion under Section 3553(e) acknowledged by the Court in *Wade*.

The substantial assistance scheme fashioned by Congress and the Commission gives the government greater flexibility to obtain guilty pleas and secure cooperation than would a scheme under which a motion to depart from the applicable Guidelines range automatically waived the statutory minimum. It also reflects the prosecutor's unique perspective on whether a defendant's assistance is sufficiently valuable to warrant a sentence below the statutory minimum, or only a sentence below the applicable Guidelines range.

II. Petitioner's contention that a court has authority to impose a sentence below the statutory minimum once the government acknowledges that the defendant has provided substantial assistance cannot be squared with the text of Section 3553(e). Under Section 3553(e), the court's authority to impose a sentence below the statutory minimum is triggered by a "motion of the Government" for such a sentence, not by the government's statement, acknowledgement, or certification that the defendant has cooperated. 18 U.S.C. 3553(e).

Nor does petitioner derive support from 28 U.S.C. 994(n). That provision directs the Commission to reflect in the Guidelines the general appropriateness of reduced sentences when a defendant has cooperated, including a sentence below the statutory minimum. The text of Section 994(n), however, does not give the Commission the authority to override the requirements in Section 3553(e). Consequently, in fashioning Guidelines to implement Section 994(n), the Commission may not authorize a court to impose

a sentence below a statutory minimum in the absence of a government motion for such a sentence.

The Commission's guideline addressing "substantial assistance" departures, Guidelines § 5K1.1, is consistent with that analysis. The Commission did not purport to dispense with the requirement of a motion under Section 3553(e) when it issued Section 5K1.1. That Section authorizes a court to depart "from the guidelines," and does not refer to sentences below the statutory minimum. Application note 1 to Section 5K1.1, which states that a departure below the statutory minimum may be justified "under circumstances set forth in 18 U.S.C. § 3553(e)," confirms that the Commission did not intend to permit a departure below the statutory minimum unless the government requests such a sentence.

Finally, the requirement of a government motion invoking Section 3553(e) will neither impermissibly constrict the discretion of sentencing courts nor lead to unwarranted sentencing disparities. Sentences below the mandatory minimum require the concurrence of both the prosecutor and the court: the prosecutor has the initial role in determining the sentencing range available to a cooperating defendant, but the sentencing court has the ultimate power to determine the sentence within the applicable range. Moreover, Congress resolved those policy issues when it enacted Section 3553(e), and any change in the requirement of a government motion as a precondition to a departure below the statutory minimum must come from that body.

ARGUMENT

I. UNDER 18 U.S.C. 3553(e), A DISTRICT COURT LACKS AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM IN THE ABSENCE OF A GOVERNMENT MOTION FOR SUCH A DEPARTURE

A. The Text Of Section 3553(e) Requires A Government Motion

The Sentencing Reform Act provides a limited basis for a sentencing court to depart from a statutory mandatory minimum based on a defendant's provision of substantial assistance in the investigation or prosecution of other persons. Under 18 U.S.C. 3553(e), entitled "[l]imited authority to impose a sentence below a statutory minimum," a court's power to impose such a sentence is conditioned "[u]pon motion of the Government." When the government files a motion requesting the court to impose a sentence below the mandatory minimum based on the defendant's substantial assistance, the court has the "authority" to do so, in order "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." *Ibid.* Such a sentence is to be "imposed in accordance" with the Sentencing Commission's guidelines and policy statements. *Ibid.* In contrast, when the government refrains from filing a motion under Section 3553(e), the court lacks the authority to go below the statutory mandatory minimum based on substantial assistance.[3]

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[3] The Sentencing Reform Act provides one other source of authority to depart from a statutory mandatory minimum sentence—the so-called "safety valve" provision enacted in the

Nothing in Section 3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the government has not moved for such a sentence, but has instead moved for a departure from the applicable Sentencing Guidelines range alone. When the government files a motion under Section 5K1.1 of the Sentencing Guidelines in recognition of the defendant's substantial assistance, "the court may depart from the guidelines." But a government motion that requests a sentence below the applicable Guidelines range without requesting a sentence below the statutory minimum does not give a court authority, under Section 3553(e), to disregard the statutory minimum sentence set by Congress.

This Court's decision in *Wade* v. *United States*, 504 U.S. 181 (1992), supports the conclusion that a government request for a sentence below the statutory minimum is necessary before a court can depart

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Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1985, codified at 18 U.S.C. 3553(f). Significantly, that provision empowers the court to act "after the Government has been afforded the opportunity to make a recommendation," *ibid.*, but it does not contain the requirement of a government motion set forth in Section 3553(e). Rather, it authorizes a court to depart in sentencing a narcotics offender when (1) the defendant has only one criminal history point; (2) the defendant did not use violence, credibly threaten violence, or possess a firearm in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant was not an organizer, leader, or supervisor, or engaged in a continuing criminal enterprise, and (5) before sentencing, the defendant truthfully provides all information and evidence the defendant has about offenses that are part of the same course of conduct or common scheme or plan. 18 U.S.C. 3553(f).

from a statutory minimum. In *Wade*, the Court interpreted Section 3553(e) as conferring on the government "a power, not a duty, to file a motion when a defendant has substantially assisted." 504 U.S. at 185. Even when a defendant provides substantial assistance, the Court explained, the government may still exercise its discretion not to move for a sentence below the statutory minimum based "on its rational assessment of the cost and benefit that would flow from moving." *Id.* at 187. The Court saw no reason to treat the discretion conferred by Section 3553(e) any differently from the discretion that prosecutors enjoy when they make other important decisions, such as what charges to file against a defendant. 504 U.S. at 185. Accordingly, the Court held that a prosecutor's judgment that a defendant's substantial assistance does not warrant a sentence below the statutory minimum is unreviewable, unless that judgment is based on an unconstitutional motive, such as the defendant's religion or race. *Ibid.*

Wade indicates that the government's role under Section 3553(e) involves making not only a judgment about whether a defendant has provided substantial assistance, but also whether the nature of that assistance, considered in light of overall prosecutorial objectives, justifies a request for a reduction from the mandatory minimum sentence. The role of the prosecutor, in short, is not merely to advise the court whether the defendant rendered substantial assistance, but to make (or refrain from making) a motion. As Judge Easterbrook has stated, under the construction of Section 3553(e) adopted in *Wade*, "[n]o matter how much the judge believes that the defendant's assistance should be rewarded, the statu-

tory minimum must be enforced unless the prosecutor shares the judge's assessment." *United States* v. *Wills*, 35 F.3d 1192, 1197 (7th Cir. 1994) (dissenting opinion).

B. The Authority Of The Government Under Section 3553(e) Facilitates Cooperation Agreements

The statutory and Guidelines provisions that permit the government to move for a departure from the applicable Guidelines range under Section 5K1.1, without waiving the statutory minimum sentence, serve important objectives in obtaining cooperation from defendants. Plea bargaining is an important component of this country's criminal justice system, *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977), and the substantial assistance motion has become one of the government's principal means of obtaining cooperation from defendants to provide investigative leads or testimony in the prosecution of other persons.

The process of securing cooperation involves "painfully delicate choices." *United States* v. *Mezzanatto*, 115 S. Ct. 797, 804 (1995) (internal quotation marks omitted). The government must decide whether to bring a prosecution and seek applicable penalties for persons known to have committed crimes, or "whether to extend leniency or full immunity to some suspects in order to procure testimony against other, more dangerous suspects against whom existing evidence is flimsy or nonexistent." *Ibid.*; see also Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69, 94-96 (1995) (describing uncertainties and risks for prosecutors and defendants). The process is enhanced when the government has flexibility to

determine the kind of substantial assistance motion it will file.

In many cases, the applicable Guidelines sentencing range is significantly above the statutory minimum. In such situations, the government may be able to secure a defendant's cooperation by offering a reduction from the Guidelines range alone, without offering to waive the statutory minimum terms and thus sacrifice the deterrent effect of those penalties intended by Congress. If, however, a government motion for a sentence below the applicable Guidelines range automatically gave the court authority to impose a sentence below the statutory minimum, the government would be reluctant to agree that a substantial assistance motion would be appropriate or to file any motion at all in cases in which it determined that the defendant's cooperation did not warrant a sentence below the statutory minimum.[4]

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[4] The Ninth Circuit's decision in *United States* v. *Keene*, 933 F.2d 711 (1991), and the Seventh Circuit's decision in *Wills* illustrate that the government and the court may often have very different perspectives on the value of a defendant's cooperation. In *Keene*, the defendant conspired to possess and distribute 437 kilograms of cocaine, which resulted in a Guidelines range of approximately 15 to 20 years' imprisonment and a statutory minimum of ten years' imprisonment. 933 F.2d at 712. The government moved for a departure from the Guidelines range, but not from the statutory minimum. The district court departed from both, however, and sentenced the defendant to only three years' imprisonment. *Id.* at 716-719 (Alarcon, J., dissenting). In *Wills*, the defendant's maximum Guidelines sentence was 108 months and his statutory minimum was 60 months. Even though the government moved for a departure from the Guidelines range, but not the mandatory minimum, the district court departed from both and sentenced the defendant to 24 months. 35 F.3d at 1194.

The unfortunate result would be that, in many such cases, the defendant would lose any opportunity to obtain a reduction of his sentence. In addition, if the government withholds the motion because it does not believe that a departure below the statutory minimum is warranted, it may run the risk that defendants in future cases would be discouraged from offering to cooperate. See *United States* v. *La Guardia*, 902 F.2d 1010, 1016 (1st Cir. 1990) ("[A] government which is overly grudging in moving for departures to reward valuable cooperation will likely discover a drying up of its sources of information."); Daniel C. Richman, 56 Ohio St. L.J. at 109 (a prosecutor who is perceived as mistreating cooperators "risks not being able to attract such assets in the future").

The substantial assistance departure scheme fashioned by Congress and the Commission should not be interpreted to require those results. As Judge Easterbrook has explained, in dissenting from a decision holding that a motion under Section 5K1.1 automatically empowers the judge to depart below a mandatory minimum sentence:

> Th[e] [plea bargaining] process works best if the amount of the reward can be graduated to the value of the assistance * * *. By holding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate, the majority curtails the prosecutor's ability to match the reward to the assistance. When cooperation can be procured for a modest reduction, a lower sentence overcompensates the defendant, at the expense of the deterrent force of the criminal law. Another consequence is that there will be fewer motions of any kind. If filing a motion under

> § 5K1.1 permits the judge to cut the sentence by three-quarters (as happened here), the prosecutor will insist on a great deal of assistance. * * * By converting the motion into an all-or-none affair, the majority ensures that for many defendants the allowed departure will be "none."

Wills, 35 F.3d at 1198 (Easterbrook, J., dissenting); see also *United States* v. *Mezzanatto*, 115 S. Ct. at 805 (holding that a prosecutor may condition plea negotiations upon a defendant's agreement that his statements may be used for impeachment purposes at trial, and noting that "[i]f prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place").

Conferring discretion on the prosecutor in this setting is also sensible, because the prosecutor has a unique perspective on whether a defendant's cooperation is sufficiently valuable to warrant a sentence below the statutory minimum as opposed to only a sentence below the applicable Guidelines range. Through personal dealings with the defendant and exposure to the range of criminal activity in the district, the prosecutor is in the best position to evaluate how complete and how useful the defendant's cooperation has been. The prosecutor also has a special competence to assess the incremental encouragement of future cooperation that would result from moving for a departure below the statutory minimum (as opposed to moving solely for a departure from the Guidelines range) and to decide whether that benefit justifies the costs to deterrence. By permitting the prosecutor to decide whether a defendant should be eligible for a sentence below the statutory minimum, or just a sentence below the applicable

Guidelines range, the scheme for departures fashioned by Congress and the Commission takes advantage of the prosecutor's unique perspective and special competence in those respects.

II. A MOTION UNDER SECTION 5K1.1 THAT DOES NOT REQUEST A SENTENCE BELOW THE STATUTORY MINIMUM GIVES A SENTENCING COURT NO POWER TO DEPART BELOW THAT MINIMUM

Petitioner argues (Br. 8) that a government motion that simply acknowledges a defendant's "substantial assistance" empowers a court to depart below both the Guidelines sentencing range and any mandatory minimum sentence. Accordingly, in his view, the government's submission to the district court under Guidelines § 5K1.1 necessarily constituted authority for the court to depart below the applicable statutory minimum. That claim cannot be reconciled with the language of Section 3553(e), and it finds no support in any other source of law.

A. An "Acknowledgement" Of "Substantial Assistance" Does Not Satisfy Section 3553(e)

1. Petitioner contends (Br. 5) that Section 3553(e) authorizes a district court to impose a sentence below the statutory minimum "once the prosecutor acknowledges that substantial assistance has occurred." That reading of Section 3553(e) conflicts with its text. The district court's authority to impose a sentence below a statutory minimum is not triggered by the government's acknowledgement that the defendant has provided substantial assistance, but by a "motion of the government." 18 U.S.C. 3553(e).

Petitioner seeks to square his position with the statutory "motion" requirement by characterizing

the triggering mechanism for a Section 3553(e) departure as a "motion that substantial assistance has occurred." Br. 12; see also National Association of Criminal Defense Lawyers (NACDL) Amicus Br. 12, 15 (stating that Section 3553(e) requires a government motion "attesting to" or "certifying" substantial assistance). In our legal system, however, motions are not mechanisms for relaying information. They are requests for action. See *Black's Law Dictionary* 1013 (6th ed. 1990) (defining motion as "[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant"); *The Random House Dictionary of the English Language* 1254 (2d ed. 1987) (defining motion as "6: *Law.* an application made to a court or judge for an order, ruling, or the like"). The only possible action that can be requested by a motion under Section 3553(e) is the imposition of a sentence below the statutory minimum. Thus, the text of Section 3553(e) requires a government *motion* requesting a sentence below the statutory minimum before a court may exercise that power—not merely a statement from the government that the defendant has provided substantial assistance.

2. The second sentence of Section 3553(e), relied on by petitioner (Br. 12), does not lead to a different conclusion. It states that a sentence below the statutory minimum "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." That language means simply that, in cases in which the government seeks a sentence below a statutory minimum, the Commission's guidelines and policy statements govern the court's exercise of discretion in imposing such a

reduced sentence. By including that statutory directive, Congress intended that a government motion for a sentence below the statutory minimum would not lead to the resurrection of the unguided district court discretion that Congress sought to replace when it enacted the Sentencing Reform Act only two years earlier. See *Wills*, 35 F.3d at 1198 (Easterbrook, J., dissenting) (the second sentence of Section 3553(e) means that "the prosecutor's authorization to impose a sentence below the statutory minimum does not permit the judge to throw out the guidelines and impose any term that strikes his fancy").

B. The Sentencing Commission Is Not Authorized To Dispense With The Requirement Of A Government Motion Under Section 3553(e), And Did Not Intend To Do So In The Guidelines

1. Petitioner and his amicus argue that 28 U.S.C. 994(n) empowers the Commission to provide that a court may impose a sentence below the statutory minimum even absent a government motion for such a sentence. Pet. Br. 12-14; NACDL Br. 10-11. That argument is incorrect. Section 994(n) provides that "[t]he Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by a statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person." 28 U.S.C. 994(n). That Section requires the Commission to reflect in the Guidelines Congress's general policy to give a sentencing reward to a defendant who renders substantial assistance. It does not, however, trump the requirement in Section

3553(e) of a government motion as a prerequisite to a departure below the statutory minimum, which was enacted in the same Act. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1007, 1008, 100 Stat. 3207-7 to 3207-8.

Nothing in the text of Section 994(n) gives the Commission the authority to override Section 3553(e), and the Commission therefore must exercise its authority under Section 994(n) in a manner that is consistent with the requirements in Section 3553(e). See *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (one section of an Act should not be interpreted "to emasculate" another section of the same Act); *Pittsburgh & L.E.R.R.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) ("when two statutes are capable of co-existence * * * it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). Just as the Commission has no authority to amend a statute that establishes a mandatory minimum sentence, *Neal* v. *United States*, No. 94-9088 (Jan. 22, 1996), slip op. 5, the Commission has no authority to amend the statute that establishes the circumstances under which a court may impose a sentence below a statutory minimum. Accordingly, in fashioning Guidelines pursuant to Section 994(n), the Commission may not authorize a court to impose a sentence below the statutory minimum in cases in which the government does not request such a sentence. Any Guideline that purported to do that would exceed the Commission's authority under Section 994(n).

2. Petitioner also errs in arguing (Br. 18-31) that the Commission intended in Section 5K1.1 of the Guidelines to authorize a district court to impose a

sentence below the statutory minimum whenever the government files a motion stating that the defendant has provided substantial assistance. It would be surprising if the Commission had intended to contradict the mandate of Section 3553(e) that a government motion is required for a departure below the statutory minimum. And, upon analysis of the provisions of Section 5K1.1 and its commentary, it is apparent that the Commission did not do so.

In Section 5K1.1, the Commission provided that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." The text of Section 5K1.1 refers only to departures "from the guidelines." It does not refer to departures from a statutory minimum. The text of Section 5K1.1 therefore cannot be understood to eliminate the requirement in 18 U.S.C. 3553(e) that a court may depart below the statutory minimum only when the government requests a sentence below the statutory minimum.

Nor does application note 1 to Section 5K1.1 indicate that the Commission intended to authorize a court to depart below the statutory minimum once the government seeks a sentence below the applicable Guidelines range. See Pet. Br. 24-26. That application note states that a sentence below a statutory minimum may be justified "[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." One of the "circumstances set forth in 18 U.S.C. § 3553(e)" for a sentence below the statutory minimum, however, is a "motion of the Government" for such a sentence.

The text and commentary of Section 5K1.1 therefore make clear that a court may apply Section 5K1.1 in departing below a statutory minimum only when the government requests a sentence below the statutory minimum pursuant to 18 U.S.C. 3553(e). Thus, when the government requests a sentence below the applicable Guidelines range, but does not request a sentence below the statutory minimum, the court has no authority under Guidelines § 5K1.1 to impose a sentence below the statutory minimum. In that situation, the court may depart from the applicable Guidelines range, but only to a floor set by the statutory minimum term.

That does not mean that Section 5K1.1 is wholly inapplicable to departures below the statutory minimum. Once the government files a motion under Section 3553(e), the sentencing court is guided by the factors set forth for consideration in Guidelines § 5K1.1.[5] That reading of Section 5K1.1 and its commentary eliminates the three purported anomalies identified by petitioner and his amicus NACDL. First, petitioner contends that, if Section 5K1.1 had no application to departures below the statutory minimum, it would mean that the Commission had not fulfilled its responsibility under Section 994(n) to

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[5] Those factors include: "(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance." Guidelines § 5K1.1(a).

provide guidance for departures below the statutory minimum. Br. 33. Second, petitioner contends that it would mean that what is labelled an application note does not contain information on how Section 5K1.1 should be applied. Br. 25 n.14, 34 & n.21. Finally, NACDL contends that it would mean that the extent of a departure below the statutory minimum would not be governed by the list of factors in Section 5K1.1. NACDL Amicus Br. 23. The answer to all those asserted anomalies is that Section 5K1.1 does apply to departures below the statutory minimum, but only after the government requests a sentence below the statutory minimum.[6]

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[6] The other application notes cited by petitioner are unilluminating. See Guidelines § 5K1.1, application note 2 (referring to a Section 5K1.1 departure as a "sentence reduction"); *id.* at application note 3 (stating that substantial weight should be given to the government's evaluation in evaluating the extent of the departure); Guidelines § 2D1.1, application note 7 (providing that a "mandatory minimum sentence may be 'waived' * * *, as provided in 28 U.S.C. 994(n), by reason of a defendant's 'substantial assistance * * *.' *See* § 5K1.1"). None of the notes suggests that the Commission intended to permit a departure under Section 5K1.1 below the statutory minimum in the absence of a government request for such a sentence pursuant to 18 U.S.C. 3553(e).

C. The Requirement Of A Government Motion Under Section 3553(e) Does Not Impermissibly Restrict The Discretion Of The Sentencing Court Or Encourage Unwarranted Disparities

1. Petitioner contends (Br. 39) that the court of appeals' interpretation of the substantial assistance scheme results in an unwarranted transfer of sentencing power from the district court to the prosecution. That suggestion is unfounded. Under the court of appeals' interpretation, the power over substantial assistance departures is shared by the prosecutor and the court. The prosecutor can affect only the lower end of the sentencing range. When the government moves for a departure from the applicable Guidelines range, but not a departure from the statutory minimum, the sentencing court may go down as far as the statutory minimum; when the government files a motion for a departure from the statutory minimum, that barrier is eliminated as well. Once the government files its motion and the sentencing floor is established, however, the district court retains discretion to impose any sentence within that range that is consistent with the Commission's Guidelines and policy statements.

The government's ability to affect the sentence by filing one kind of substantial assistance motion rather than another is analogous to the government's ability to affect sentencing through selection of the charge. See *United States* v. *Batchelder*, 442 U.S. 114, 123-125 (1979) (holding that a prosecutor has discretion to prosecute a defendant under one statute rather than another in order to expose the defendant to a higher sentence). The government's selection of one charge over another can lead to dramatically different sentencing ranges. The district court re-

tains discretion, however, to determine the appropriate sentence within the range dictated by the charge. *Id.* at 125. Here, as in other settings, that sort of exercise of prosecutorial judgment is valid and consistent with the sentencing role of courts. See *Wade* v. *United States*, 504 U.S. at 185 ("we see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions").

2. Petitioner also contends (Br. 37-38) that the court of appeals' construction of the substantial assistance scheme will lead to unwarranted disparities in sentencing. Permitting the government to participate in establishing the sentencing range available to a defendant who cooperates is no more likely to lead to unwarranted disparities than would a regime under which the extent of a departure would lie wholly in the discretion of individual district judges, subject only to the Commission's guidance concerning the factors a court should consider. In any event, Congress resolved those policy issues by including the government motion requirement in Section 3553(e), and any change in the requirement of a government motion as a prerequisite to the imposition of a sentence under a mandatory minimum must come from that body.[7]

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[7] Petitioner also suggests (Br. 40) that the rule of lenity compels the adoption of his interpretation of the substantial assistance scheme. The rule of lenity, however, "is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and emphasis omitted). For the reasons discussed, that is not the situation here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

WAN J. KIM
Attorney

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No. 95-5661

In The

Supreme Court of the United States

October Term, 1995

JUAN MELENDEZ,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

PATRICK A. MULLIN
Counsel of Record
25 Main Street
Court Plaza North
Hackensack, NJ 07601
Telephone: (201) 487-9282
Attorney for Petitioner

Of Counsel:

DAVID ZLOTNICK, ESQ.
1001 Pennsylvania Avenue, N.W.
Suite 200 South
Washington, DC 20004
(202) 457-4204

PETER GOLDBERGER, ESQ.
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY

The respondent stakes its entire position in this case on a strained interpretation of the first clause of 18 U.S.C. § 3553(e), read in isolation. The respondent infers that this clause alone necessarily mandates a bifurcated, two-track substantial assistance system, which requires separate and exclusive government motions for a sentence below a statutory minimum and a sentence below a guideline range.

The respondent's analysis of § 3553(e) is wrong both as a matter of general statutory interpretation and based upon clear evidence of a contrary congressional intent. Instead, § 3553(e) must be construed in conjunction with the two related provisions which were enacted contemporaneously with § 3553(e) as part of the Anti-Drug Abuse Act of 1986 ("ADAA"), now codified at 28 U.S.C. § 994(n) and Fed. R. Crim. P. 35(b).

In addition, petitioner's interpretation of USSG § 5K1.1 (p.s.), unlike the respondent's, is consistent with the Commission's intent and the Congressional mandate for a unified substantial assistance regime. For these reasons, a motion by the government under § 5K1.1 for a sentence that reflects a defendant's substantial assistance to authorities allows the court, in its discretion, to impose a sentence which either departs below the guideline range, or is lower than a statutory minimum, or both.

I. Congress Empowered the Commission to Authorize Courts to Sentence Below a Statutory Minimum Once the Prosecutor Moves For a Sentence that Reflects the Defendant's Substantial Assistance.

The ADAA created an incentive for defendants to aid law enforcement efforts by authorizing reduced punishment for those who provide "substantial assistance" in the investigation or prosecution another person. This is reflected in three consecutive provisions of the ADAA –

Section 1007 (enacting 18 U.S.C. § 3553(e)), Section 1008 (enacting 28 U.S.C. § 994(n), and Section 1009 (amending Rule 35(b) of the Federal Rules of Criminal Procedure). Interpretation of any one of these three contemporaneously enacted provisions cannot ignore the meaning and language of the other two. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 405 (1991) (recognizing relationship of ADAA §§ 1007 and 1009). As the Court recently stated in *Reno v. Koray*, 515 U.S. ___, 132 L.Ed.2d 46, 115 S.Ct. 2021, 2025 (1995), "it is a fundamental principle of statutory construction (and, indeed, of language itself), that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it was used." *Id.*, citing *Deal v. United States*, 508 U.S. ___, 113 S.Ct. 1193, 1996, 124 L.Ed.2d 44 (1993).

A. The Government's Exclusive Reliance on the First Clause of § 3553(e) Violates Basic Tenets of Statutory Construction.

The respondent asserts that the prosecutor must invoke 18 U.S.C. § 3553(e) expressly in its substantial assistance motion, otherwise the court is powerless to impose a sentence below a statutory minimum. The government arrives at this construction of the statute by a myopic focus on the first clause of the first sentence of § 3553(e), which states, "Upon motion of the government, ... " Resp. Brief 11-12.

The first clause of § 3553(e) does not necessarily, by its terms, establish the entire procedural framework for its implementation. The government's claim that its motion must cite § 3553(e) to trigger the court's authority can only be premised on the false assumption that § 3553(e) is the sole statute concerning sentences lower than statutory minimums in recognition of substantial assistance. Therefore, so the logic goes, § 3553(e), by

default, must also fully describe the implementing mechanism.[1]

Koray presented a similar statutory interpretation issue. In that case, while the Court recognized that viewed in isolation either party's interpretation of the term "official detention" might be valid, the correct definition could only be determined by examining the other provisions of the Bail Reform Act and the Sentencing Reform Act, using that and related phrases, with which the provision at issue had been enacted. *Id.* Similarly, § 3553(e) cannot be interpreted as an isolated text. Only an examination of § 3553(e) in the context of three interrelated substantial assistance provisions of the ADAA including § 994(n) and the amended Rule 35(b), yields a proper interpretation of § 3553(e).

Several points emerge from such an examination. First, each of these provisions uses the same definition of "substantial assistance" and explicitly was intended to reach statutory minimum cases. Second, the ADAA's amendment to Rule 35(b) provides a single mechanism for both statutory minimum and guideline range post-conviction sentence reductions. Third, Congress empowered the Commission in § 994(n) to create a single mechanism to implement a court's statutory sentencing authority, including its authority under § 3553(e). It follows that Congress intended to create a unified approach for substantial assistance sentences in which § 3553(e)'s authority may be implemented through the Commission's guidelines and policy statements.

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[1] In its opposition to the petition for certiorari, the respondent took the contrary view, claiming that the language of § 3553(e) was ambiguous. Brief in Opp. at 6-7 n. 4. The language cannot be as clear as now claimed if the government's own counsel could not readily see its meaning.

1. Congress' Directions to the Commission to Regulate Substantial Assistance Cases that Encompass Both Guideline and Statutory Minimums Belies the Government's Claim that Congress Intended to Mandate a Bifurcated, Two-Motion System.

Not only is the government's analysis of the ADAA flawed due to its preoccupation with the first clause of § 3533(e), the government also ignores the clear implications of the language of 28 U.S.C. § 994(n) and the amended Rule 35(b).

In § 994(n), Congress directed the Commission to devise guidelines that impose a lower sentence to account for substantial assistance, "*including* a sentence that is lower than that established by a statute as a minimum sentence." (Emphasis added). Therefore, it is entirely consistent with Congressional intent for the guideline provision which is the Commission's implementation of § 994(n) to serve as the mechanism for triggering the court's authority under § 3553(e), as long as the Commission includes in that provision the government motion requirement of § 3553(e). Section 5K1.1 meets this criterion by requiring a government motion for sentences below both a guideline and statutory minimum. If § 5K1.1 were intended to encompass only guideline departures, a government motion would not have been necessary, because § 994(n) does not mention that precondition.

The government attempts to dismiss the import of § 994(n) by characterizing petitioner's argument as a claim that § 994(n) "trump[s] the requirement in Section 3553(e) of a government motion as a prerequisite to a departure below the statutory minimum." Resp. Br. at 20-21. This argument is a straw man. Petitioner has never argued that a government motion is not required to empower the court to sentence below a statutory minimum on account of substantial assistance. Rather, the critical question the government fails to answer directly

is whether Congress envisioned under § 994(n) that two different motions were required in substantial assistance cases to distinguish between a sentence below a guideline range and a statutory minimum.[2] The express reference to both situations in § 994(n) reflects a Congressional intent that the Commission could devise a single generic mechanism to trigger the court's authority in either case. Thus, § 3553(e) and § 994(n) do not conflict. These two sections merely authorize the two appropriate authorities, the court and the Commission, to implement this single exception to otherwise binding sentencing rules elsewhere imposed each.

2. The Contemporaneous Creation of a Single Motion Requirement For Post-Conviction Substantial Assistance Sentence Reductions Shows that Congress Intended That Only One Motion Be Necessary to Trigger a Court's Full Statutory Authority in Substantial Assistance Cases.

Any remaining uncertainty over whether Congress intended there to be separate motion-tracks for sentences below a statutory minimum and a guideline range is resolved by examining the third substantial assistant provision of the ADAA. As correctly noted by the government, Resp. Br. at 3 n.1, Rule 35(b) of the Federal Rules of Criminal Procedure was also amended as part of the ADAA. Section 1009, of that Act provides that upon motion by the government, a court has authority to reduce a previously imposed sentence to reflect a defendant's substantial assistance made after the imposition of

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[2] It should be acknowledged that when we say "two different motions", we recognize that the respondent's theory of its own power would allow a single motion, so long as it contained two citations to authority, referencing explicitly both § 5K1.1 and § 3553(e).

sentence. *See also* 18 U.S.C. § 3582(c)(1)(B). Like § 3553(e), § 1009 required that such sentence be imposed "in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, under United States Code . . . ". However, section 1009 also added the following critical language to Rule 35(b):

> The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.

Thus, the ADAA created one rule, Rule 35(b), under which only one post-sentence motion by the government is necessary to trigger the court's authority to impose a sentence that is a lower than a guideline range and/or lower than a statutory minimum. The implication of this one-motion regime for post-conviction substantial assistance reductions is fatal to the government's claim that the ADAA nevertheless implicitly created a bifurcated, two-motion requirement for substantial assistance motions at sentencing.

Under the respondent's interpretation, a defendant who provides "substantial assistance" before sentencing must bargain for a government promise to move for a sentence lower than a statutory minimum and separately seek a government promises to move for a downward departure from the guidelines. Otherwise, the government insists, the court is powerless to grant one or the other form of relief. On the other hand, under the ADAA-amended Rule 35(b), a defendant who waits until after sentencing to provide substantial assistance need only obtain the promise of a single government motion under Rule 35(b) to empower a court to grant both kinds of relief.

Congress cannot have intended such an absurd result, which would encourage defendants to delay their cooperation until after sentencing. Rather, the proper

inference to be drawn from the amendment to Rule 35(b) is that Congress envisioned that for both pre- and post-sentence substantial assistance, the government has only the power to move the court to recognize the substantial assistance, upon which the court is fully empowered to impose an appropriate sentence, be it lower than the guideline range or lower than a statutory minimum, or both. This reading of the ADAA's three substantial assistance provisions is straightforward and internally consistent; the respondent's interpretation is not. Furthermore, the government's logic is flawed even when applied to its own actions in this case.

B. The Government Met the Conditions of § 3553(e) in this Case and Thereby Empowered the District Court to Impose a Sentence Lower than the Statutory Minimum.

The respondent argues that it did not make the motion described by § 3553(e) to authorize the court to impose a sentence below a statutory minimum. Examination of the government's actual conduct, in this case, reveals the same mistaken premise that Congress itself created a bifurcated, two-track system.

In the District Court, the government filed a § 5K1.1 motion which sought a lower sentence for petitioner Melendez in recognition of his having provided substantial assistance to law enforcement authorities.[3] The plea agreement provided that the government would move, pursuant to § 5K1.1, for a sentence below the applicable guideline range. That agreement, however, did not state

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[3] The government actually filed an informal letter "in lieu of a formal brief." J.A. at 13-14. The District Court understood, as have the parties, that by this letter, the government had moved on the basis that substantial assistance had occurred. *See* Judgment in a Criminal Case, J.A. 21.

how far below the guideline range the government would seek to have sentence imposed, and it certainly did not specify any floor for such a reduction. J.A. 4-11.[4] Thus, the government in this case did comply with the first requirement of § 3553(e) that the government make a motion for a lower sentence based on its judgment that the defendant had provided substantial assistance. On that basis alone, the court was authorized by § 5K1.1 and § 3553(e) to impose a sentence departing below the applicable guideline range, even if that sentence was also lower than the statutory minimum.

Thus, the government cannot represent that the motion it did file was somehow substantively deficient. Rather, it must fall back on its argument that § 3553(e)'s first clause implicitly requires a citation to § 3553(e) in the motion or a specific request for a sentence below a statutory minimum. As has been shown, however, the government simply cannot justify this position based upon the first clause of § 3553(e) alone. In essence, the government interprets this clause as if it included the additional phrase, upon motion of the government *pursuant to this section*. Without this insert, however, there simply is no requirement that the government's motion do more than allege substantial assistance and request a lower sentence to validly trigger the district court's authority under

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[4] The only reference to a statutory minimum in the plea agreement is a boilerplate reference to the statutory penalties. *Id.* at 6. The agreement does not indicate in any way that the government opposed a sentence lower than a statutory minimum. In fact, the agreement notes that the sentence to be imposed is within the sole discretion of the sentencing judge, "subject to the provisions of the Sentencing Reform Act, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998. *Id.* Thus, this agreement could readily be construed by petitioner (as indeed it was) as still permitting the court, pursuant to § 3553(e), to impose a sentence lower than the statutory minimum.

§ 3553(e). In fact, the government has admitted as much when it noted in its brief in opposition to the petition for certiorari, that a bill to add such language to § 3553(e) was introduced in Congress this year.[5]

The government attempts to avoid this result by charging that under petitioner's approach, a government motion under § 5K1.1 is not a true petition for relief, but simply a government "acknowledgement that the defendant has provided substantial assistance" or "a statement from the government that the defendant has provided substantial assistance." Resp. Br. at 18, 19. These quotations mischaracterize petitioner's argument. All motions require a court to "recongize" or "acknowledge" the predicate facts that underlie a request for relief. *See* Fed. R. Crim. P. 47. A substantial assistance motion must contain a representation that substantial assistance has been rendered. The court must "recognize" or "acknowledge" this assertion before it can grant relief. This has no bearing on whether the court can exercise its authority under § 3553(e) to sentence below a statutory minimum once the government makes this representation as a basis for seeking a lower sentence. Under the unified approach of the ADAA, no more than and no less than a government motion for a sentence that reflects the defendant's substantial assistance and the court's evaluation of that assistance under § 5K1.1 is necessary to trigger the court's full statutory authority, including its authority to sentence

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[5] Brief in Opp. at 7, note 4. *See* Section 735 of S.3, 104th Cong., 1st Sess. (1995), reprinted in 141 Cong. Rec. S90 (daily ed. Jan. 4, 1995) (statute would add the following language to § 3553(e): "the power to reduce a sentence under this section authorizes a court to impose a sentence that is below a level established by statute as a minimum sentence only on motion of the government specifically seeking reduction below such a level.").

below a statutory minimum.[6] The extent of that sentence reduction may be guided by a prosecutorial recommendation, but the government cannot control the outcome by the citations in its pleadings.

II. The Commission Implemented the Congressional Mandate for a Unified Substantial Assistance System in Policy Statement § 5K1.1.

Section 994(n) of Title 28 U.S. Code, directs that the Sentencing Commission's guidelines account for substantial assistance rendered to law enforcement by defendants, including cases involving statutory minimums. Rather than start with this mandate and presume that the Commission faithfully complied, the respondent begins with its peculiar interpretation of § 3553(e) and then claims "it would be surprising" if the Commission intended to contradict the government's view of the first clause of that statute. Resp. Br. at 22. The respondent's approach to U.S.S.G. § 5K1.1 (p.s.) turns the concept of agency deference on its head. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (agency's action "entitled to a presumption of regularity"). Instead, the proper approach is to begin with the mandate in

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[6] In the absence of supporting evidence of Congressional intent, the government's argument that it can restrict the court's sentencing authority by the form of or citations within its motion boils down to an elevation of form over substance, and thus is reminiscent of the archaic rules of pleading that were abolished with the creation of the modern codes of civil and criminal procedure. *See* Surbin, Stephen, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 U. Pa. L. Rev. 909, 915-16 (1987). *Cf.* 28 U.S.C. § 1653; Fed. R. Crim. P. 7(c)(3). It is contrary to the entire philosophy of federal procedural rules, under which the court's power to act is seldom, if ever, constrained by the movant's citations of authority.

§ 994(n) and the Commission's response in § 5K1.1. If § 994(n) and § 5K1.1 are consistent with one another, but not with the government's proposed interpretation of § 3553(e), it is the government's approach to § 3553(e), and not § 5K1.1, which needs to be revisited.

A. The Commission Reasonably Concluded that Congress Desired a Single Guideline Mechanism For Substantial Assistance Cases.

As discussed in Part I of this Reply Brief, the three substantial assistance provisions of the 1986 ADAA demonstrate Congress' preference for a unified, one motion substantial assistance regime.

By requiring a government motion in § 5K1.1, the Commission demonstrated its effort to devise a guideline provision that would apply equally to both guideline and statutory minimum cases. There is no apparent reason for the Commission's decision to extend the government motion requirement to guideline cases other than to unify the substantial assistance sentencing for statutory and guideline minimums. The respondent's brief never addresses this point. Furthermore, the government ignores the fact that § 5K1.1 was submitted to Congress for review, which then permitted it to go into effect; *see* U.S.S.G. Ch. 1, Part A(2); 52 Fed. Reg. 18046, 18103-04 (May 13, 1987); further supporting the inference that Congress viewed § 5K1.1 as a proper application of the statutory mandate.

B. The Text of § 5K1.1 Is Consistent With the View That the Commission Intended this Policy Statement to Apply to Substantial Assistance Cases Involving Statutory Minimums.

The heart of the respondent's argument that the Commission did not implement the mandate of § 994(n) to address its substantial assistance rules to statutory

minimum cases is the Commission's use of the phrase "the court may depart from the guidelines" in § 5K1.1. The government insists that the absence of the additional term, *and from a statutory minimum*, is fatal to the petitioner's case. The government's reading of the body of § 5K1.1, however, lacks an appreciation of how the Commission uses guideline and policy statement text versus guideline commentary in the Sentencing Guidelines Manual and how the Commission uses the term "the guidelines" to have different meanings depending on the context in which it is used.

1. Under the Commission's Practice and Procedure, It Was a Reasonable Choice Not to Discuss Statutory Minimums in the Body of § 5K1.1, But Instead to Explain The Relationship in Explanatory Commentary.

There are several reasonable and consistent explanations for why the Commission used the phrase, "depart from the guidelines," in § 5K1.1, yet still intended this policy statement to apply to substantial assistance cases in which the court wishes to exercise its discretion to impose a sentence below a statutory minimum.

First, as discussed in the preceding section, in the interest of uniformity and pursuant to its Congressional mandate, the Commission chose to require a government motion for guideline departures, although such a requirement was not necessarily imposed by § 994(n). Obviously, this policy decision had to be reflected in the body of § 5K1.1. On the other hand, because a government motion was already required for statutory minimum cases by § 3553(e), it would have been surplusage for the Commission to add the phrase the government contends is missing to the body of § 5K1.1. As noted by Amicus NACDL,

the absence of that phrase should, therefore, be accorded no significance. NACDL Br. at 21-22.[7]

Second, as noted in petitioner's initial brief, the Commission uses the body of each guideline or policy statement to describe the correct approach to the "heartland case." U.S.S.G. Ch. 1, Part A(4)(b) (p.s.). Given that the majority of federal criminal statutes do not contain statutory minimums, it was reasonable for the Commission to discuss such cases only in commentary. *See* U.S.S.G. § 1B1.7 (p.s.) The government does not respond to either of these two "drafting" arguments.

Third, and most simply, the phrases "depart from the guidelines" itself covers and encompasses the power to sentence below a mandatory minimum. In cases where a statutory minimum term applies which is lower than the applicable guideline range, as in petitioner's case, a sentence below the mandatory *is* a departure from the guideline as well. Where the mandatory term is higher than what would otherwise be the guideline range, the guidelines themselves define that statutory requirement as "the guideline sentence" U.S.S.G. § 5G1.1, so that a "departure from the guidelines" is, in that sort of case, also a sentence below the mandatory minimum. Thus, the terminology of § 5K1.1 merely represents an economy of language.

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[7] Amicus NACDL also correctly points out that under U.S.S.G. § 1B1.7, policy statements (such as § 5K1.1) and commentary (such as the application notes to § 5K1.1), are accorded equal weight. Thus, the Commission did not intend that the body of § 5K1.1 be examined independently of the relevant commentary, NACDL Br. at 21.

2. Use of the Term "the Guideline" is Sufficiently Variable to Mean a Sentence Otherwise Required by a Statutory Minimum in § 5K1.1.

The respondent's argument that the text of § 5K1.1 fails to address statutory minimums is premised on a rigid definition of the term, "the guidelines" as used in § 5K1.1, and one which is mutually exclusive of statutory minimums. Contrary to these assumptions, however, the Commission itself uses the term, "the guidelines," to have a variety of meanings, including reference to statutory minimums under certain circumstances. Thus the term, "the guideline sentence," in § 5G1.1, is used by the Commission to mean both a guideline derived and a statutory minimum derived term of imprisonment.[8] This broader definition of "the guidelines" in § 5K1.1 has the advantage of being consistent with the congressional mandate in § 994(n) to include sentences below a statutory minimum, and hence should be preferred.

This interpretation of the term, "the guidelines," in § 5K1.1 is also supported by the Commission's choice of language in the rest of "Part K – Departures" in the Guidelines Manual. In these related policy statements (*see* §§ 5K2.0-2.16, which describe other grounds for departures), the Commission consistently uses the narrower term, "the authorized guideline range." This difference also supports the inference that the Commission had a broader definition in mind for the term "the guidelines" as used in § 5K1.1.

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[8] *See also* NACDL Brief at 22-23 (discussing Congress' uses of multiple meanings of the phrase, "the guidelines").

C. The Applicable Commentary Reveals the Commission's Intent that § 5K1.1 Apply to Statutory Minimum Cases.

Petitioner has argued that Application Note 1 to § 5K1.1 provides evidence that the Commission intended § 5K1.1 to apply to substantial assistance cases involving statutory minimums. Pet. Br. 23-31. Respondent disputes the significance of this note, again, basing its argument on the unwarranted inferences that the first clause of § 3553(e) tells the entire tale. However, Application Note 1 is more naturally read as appraising a sentencing court that it has authority under § 5K1.1 and § 3553(e) to impose a sentence that is below the guideline range, even if that sentence is also lower than a statutory minimum.

Petitioner's interpretation of § 5K1.1, but not the respondent's, also gives meaning to Application Note 3 to § 5K1.1. See Pet. Br. 27-28. The respondent dismisses Application Note 3 and this inference, arguing only that it does not directly address the question presented in this case. Resp. Br. 24 n. 6. Similarly, the respondent refuses to address the import of Application Note 7 to § 2D1.1. Resp. Br. 24 n. 6. Application Note 7 refers only to § 994(n) and § 5K1.1 as the authority for the court's power to sentence below a statutory minimum. The Commission's failure to cite § 3553(e) suggests that the Commission understood § 994(n) and § 5K1.1 to encompass the authority of the court to impose a sentence lower than a statutory minimum.[9]

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[9] The respondent claims that the Commission met the mandate of Section 994(n) because the factors listed in § 5K1.1 apply after the government specifically requests a sentence below a statutory minimum. Resp. Br. at 23. This contradicts respondent's earlier claim that § 5K1.1 does not apply to statutory minimums because the Commission did not refer to them in the body of § 5K1.1. This argument is also inconsistent

D. The Government's Interpretation of § 5K1.1 Would Lead to Absurd Results.

All of the government's arguments are premised on a sentencing scenario where the guideline range is higher than the statutory minimum. The opposite situation also occurs frequently,[10] and under those circumstances, the government's interpretation of § 5K1.1 leads to absurd results.

Assume that during plea negotiations, the government promises to file a substantial assistance motion under § 5K1.1. After the presentence investigation, however, the guideline range is determined to be lower than the statutory minimum. Under the government's approach, the government's promise to move under § 5K1.1 is now completely worthless to the defendant either because the statutory minimum is above the guideline range, or because the "guideline sentence" is also a mandatory minimum. U.S.S.G. § 5G1.1(b), from which no departure, on the government's theory, has been authorized. Recognizing this anomaly, the Third Circuit suggests in the opinion below that a motion under either § 5K1.1 or § 3553(e) motion would be sufficient in this instance. J.A. 30 (*United States v. Melendez*, 55 F.3d 130, 135 (3d Cir. 1995)). But, either § 5K1.1 is a conduit for the court's authority under § 3553(e), or it is not. Hence, this concession by the court below reveals the inconsistency

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with the mandate of § 994(n). Section 994(n) requires that the Commission regulate all statutory minimum substantial assistance cases, not just those in which the government consents to regulation.

[10] *See, e.g., Neal v. United States*, 516 U.S. ___, 116 S.Ct. 763, 765 (1996) (defendant's guideline range was seventy to eighty-seven months but was sentenced to the applicable ten year mandatory minimum because that was his "guideline sentence" under U.S.S.G. § 5K1.1).

of its opinion and is fatal to the respondent's position as a general solution to the problem presented.

III. The Government's General Policy Arguments Are Not Persuasive Evidence that Congress Intended to Give the Government Control Over a Court's Statutory Sentencing Discretion in Substantial Assistance Cases.

Throughout its brief, the respondent argues that it is good criminal justice policy to have a bifurcated substantial assistance scheme in which the prosecutor controls the court's sentencing discretion. The government's self aggrandizing judgment of what constitutes good policy is no substitute for evidence that Congress shared this view. Furthermore, there are sound policy reasons which suggest that Congress had no such purpose in mind when it enacted the three substantial assistance provisions in the 1996 ADAA.

A. The Government Has Provided No Evidence of Congressional Intent to Support Its Policy Arguments.

The respondent contends that Congress implicitly created a bifurcated, two-track motion system in the ADAA under which the prosecutor can control the court's discretion to impose a sentence below a statutory minimum or below a guideline range. The respondent's argument overlooks the fact that Congress had the clear opportunity to establish a bifurcated system in the ADAA when it amended Rule 35(b) to create a post-conviction substantial assistance mechanism.[11] Instead, Congress

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[11] A bifurcated Rule 35(b) would explicitly require separate government motions, or a limitation on the court's power tied to the extent of relief sought by the government as movant, for a

chose to create one rule of criminal procedure under which the court could impose a sentence below the previous statutory or guideline minimum.

To support its policy argument, the government attempts to analogize the power it seeks here over the court's sentencing discretion to other traditional prosecutorial functions, Resp. Br. at 13, 25-26, citing, *inter alia*, *Wade v. United States*, 504 U.S. 181 (1992). However, the government's reliance in *Wade* is misplaced for two reasons. First, in *Wade*, the Court explicitly decided not to address the issue presented in this case *Id.* 504 U.S. at 185 ("We are not, therefore, called upon to decide whether § 5K1.1 'implements' and thereby supersedes § 3553(e) . . . or whether the two provisions pose two separate obstacles."). Second, try as the government might to appropriate that power, the decision to pass sentence is still presumed to lie within the domain of the court and is thus readily distinguishable from other traditional prosecutorial decisions. In fact, recognizing this distinction, in § 5K1.1, once the government files its motion, the Commission gave the government only an advisory role with the court determining the appropriate sentence. Therefore, there is no evidence that the Congress or the Commission intended to further encroach on the traditional authority of the court over sentencing.

B. The Power Sought By the Government Is Both Unnecessary, and an Unlikely Choice of Either Congress or the Commission to Increase the Government's Plea Bargaining Position.

In the final analysis, much of the respondent's position in this case boils down to a policy argument that the government needs or deserves more bargaining power in

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substantial assistance reduction from the guideline range and from a statutory minimum.

substantial assistance cases that Congress chose to grant it. This argument flies in the face of the tremendous leverage that was granted to the government in the ADAA's substantial assistance scheme, no matter how § 994(n) and § 5K1.1 are construed in this case.

The 1986 ADAA created both mandatory minimums and the power to waive them to reward substantial assistance. Section 3553(e) explicitly grants the government a powerful tool in plea bargaining negotiation by requiring a government motion. The Commission further expanded this power by engrafting the government motion to substantial assistance case under the guidelines. Therefore, the government's undocumented assertion that it has still greater needs rings hollow and should be unpersuasive to the court.[12]

Second, if Congress and the Commission sought to give the prosecutor more control over the amount of the sentence reduction in substantial assistance cases, there is no reason to believe either would have chosen such an unwieldy method as desired by the government in this case. For example, while in many cases the guideline range is higher than the applicable statutory minimum, there is no uniform ratio for how much higher the guidelines are in any given case. Quite simply, the bargaining chip the government seeks here is an imprecise tool for fine tuning a plea agreement.[13] Ultimately, the

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[12] The respondent suggests that under petitioner's interpretation of these provisions, the government will become less willing to make substantial assistance motions, to the ultimate detriment of defendants. However, decisions contrary to the lower court opinion in this case have been the law in several circuits since 1992. Nevertheless, the government provides no evidence of any decrease in cooperation agreements or any detrimental impact on law enforcement.

[13] Of course, nothing in this argument prevents the government from bargaining for a specific limit to the

government's policy arguments are devoid of statutory support and unwise on their merits. *See also* Morvillo, Robert G. & Bohrer, Barry A., "Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation," 32 Am. Crim. L. Rev. 137, 151 (1995); Powell, William J. & Cimini, Michael T., "Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?" 97 W.Va.L.Rev. 373 (1995).

CONCLUSION

For all the foregoing reasons, and those set forth in the petitioner's opening Brief, the judgment of the United States Court of Appeals for the Third Circuit must be reversed, and the case remanded for resentencing, without limitation as to the extent of the downward departure that can be granted.

February 20, 1996

Respectfully submitted,

PATRICK A. MULLIN, Esq.
Counsel of Record
Attorney for Petitioner
Court Plaza North
Suite 200
25 Main Street
Hackensack, NJ 07601

Of Counsel:

DAVID ZLOTNICK
PETER GOLDBERGER

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departure, including restricting the sentence to a range above a statutory minimum pursuant to Fed. R. Crim. P. 11(e)(1)(A-C).

(8)

No. 95-5661

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JUAN MELENDEZ

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN NEW JERSEY

CHESTER M. KELLER
972 Broad Street
Newark,New Jersey 07102
(201) 645-6347

Counsel for Amicus Curiae
Association of Criminal Defense
Lawyers in New Jersey

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EDITOR'S NOTE

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I. INTEREST OF THE AMICUS CURIAE

The Association of Criminal Defense Lawyers of New Jersey has a membership of approximately 550 members who practice criminal defense throughout the State of New Jersey. Many of our members appear regularly, if not exclusively, before the United States District Court. Obviously, the implementation of the Federal Sentencing Guidelines has created a total transformation in the practice of criminal law in the federal courts. Clearly, the provisions of the United States Sentencing Guideline § 5K1.1 plays a critical part in the possible disposition of criminal cases within this federal system. The discretion of the Court to implement this provision upon motion of the government remains a vital aspect of the Guideline scheme. The pending writ raises an important question on the ability of the Court to impose sentencing and the limitations of prosecutorial action. This Association chooses very carefully the cases in which it seeks to appear as amicus curiae. It is the belief of the Association that the instant issue is crucial to the rights of criminal defendants and to the fair administration of justice.

II. SUMMARY OF ARGUMENT

The petitioner maintains that the intent of Congress and the United States Sentencing Commission is clear that the provisions of 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) are implemented by U.S.S.G. § 5K1.1. Therefore, once the government files a motion to the Court stating that a defendant has provided "substantial assistance in the investigation or prosecution of another person who has committed an offense", then the Court has the power to impose a sentence below the applicable guideline or the mandatory minimum set by statute. 18 U.S.C. § 3553(e) was enacted by Congress in 1984 as part of the Omnibus Crime Bill. 28 U.S.C. § 994(n) was also passed by Congress in 1984 as part of the Sentencing Reform Act which provided the enabling legislation for the United States Sentencing Guidelines. Both statutory provisions utilize virtually verbatim language indicating the desire of Congress to reward defendants who cooperate with law enforcement in the investigation or prosecution of another. Both provisions specifically mention the ability of the Court to impose a sentence below the minimum established by statute. Of course, § 3553(e) seemed to limit such power only upon motion of the government. § 994(n) had no such requirement, but explicitly mandated the Sentencing Commission to promulgate a provision that would allow for the imposition of sentences below the mandatory minimum and the applicable guideline. Also, § 3553(e) specifically states that such sentence below the mandatory minimum "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." The manifestation of such Congressional intent is embodied in U.S.S.G. § 5K1.1.

It seems apparent for a number of reasons that § 5K1.1 fulfills the Congressional mandate and that § 5K1.1 and § 3553(e) was intended to perform the same function. § 5K1.1 utilizes a combination of the same language from the statutory provisions in its formulation. Though § 994(n) has no reference

to a requirement of a government motion, the Sentencing Commission clearly relies on § 3553(e) for that requirement in § 5K1.1. All three provisions reiterate the necessity that a defendant provide "substantial assistance in the investigation or prosecution of another person who has committed an offense." Application note 1 of § 5K1.1 plainly indicates that § 3553(e) and § 994(n) were the enabling legislation for § 5K1.1, because they are referenced as providing the statutory authority for sentences below the mandatory minimum. The general background commentary of § 5K1.1 explains that the "extent and significance of assistance . . . must be evaluated by the court on an individual basis. Latitude is therefore afforded the sentencing judge to reduce a sentence . . ."

The significance of the § 5K1.1 motion is further evidenced by application note 7 of § 2D1.1. The Sentencing Commission explains in the note that a mandatory minimum sentence in drug cases can be waived based on "substantial assistance" and then cites § 5K1.1 as its authority for such position. Can the intent of the Commission be any more clear? This Court has reviewed the provisions of U.S.S.G. § 1B1.7 and held that the commentary in the sentencing guidelines manual that interprets or explains the guideline is authoritative. The commentary of § 2D1.1 and § 5K1.1 made clear the ability of a § 5K1.1 motion to allow for a sentence below the mandatory minimum.

Finally, 28 U.S.C. § 994(o) provided for a mechanism by which a guideline could be revised or amended to conform with the intent of the legislature in enacting the guideline format. If § 5K1.1 did not adhere to the directives of Congress in § 3553(e) and § 994(n), it could have been revised. The majority of the federal appellate courts that have considered this issue have held that a § 5K1.1 allows for a Court to impose a sentence below the mandatory minimum. The inaction of Congress and the United States Sentencing Commission affirms such findings.

III. ARGUMENT

A MOTION BY THE GOVERNMENT PURSUANT TO UNITED STATES SENTENCING GUIDELINE § 5K1.1 ALLOWS THE COURT TO IMPOSE A SENTENCE BELOW THE MANDATORY MINIMUM SET BY STATUTE

The issue presently before this Court involves allowing judges to judge and prosecutors to prosecute. Such simplistic language succinctly frames the context of the argument. The instant petition requests that this Court determine that the provisions of Title 18 United States Code (U.S.C.) § 3553(e) is implemented by the United States Sentencing Guideline (U.S.S.G.) § 5K1.1 rather than posing two separate mechanisms. This Court recognized this looming problem in Wade v. United States, 504 U.S. 181, 185 (1992) and now has the opportunity to address it. Juan Melendez, the petitioner in the instant matter, was granted a motion by the government pursuant to U.S.S.G. § 5K1.1, but such motion did not also utilize the language of 18 U.S.C. § 3553(e). The lower courts found that the sentencing court did not have the power to impose a sentence upon Mr. Melendez below the statutory mandatory minimum of ten years. Such determinations were contrary to the majority of federal appellate courts that have reviewed this precise issue. The will of Congress and the United States Sentencing Commission seems frustrated by such a limited reading of the applicable legal provisions. The fundamental framework of our government and legislative intent necessitate that this Court find error below and remand this matter for resentencing.

The Sentencing Reform Act of 1984 created the United States Sentencing Commission and evidenced a clear intent on the part of Congress to reform the sentencing process in federal court with the use of sentencing guidelines. In Mistretta v. United States, 488 U.S. 361 (1989) this Court found that the structure of the Commission did not violate the doctrine of separation of powers

and did not result in excessive delegation of legislative power to the Commission. The enabling legislation for the implementation of these guidelines is codified in 28 U.S.C. § 991 et. seq. and demonstrates the broad powers that Congress was imparting to the Commission. For instance, 28 U.S.C. § 991(b) explains that the purposes of the Commission are to establish sentencing policies that meet the goals of 18 U.S.C. § 3553(a)(2) and provide fairness in meeting the purposes of sentencing "while maintaining sufficient flexibility to permit individualized sentences when warranted. . ." 28 U.S.C. § 994 explains the various factors the Commission should consider in the promulgation of the guidelines. Subsection (n) of § 994 more specifically mandates that the Commission must produce guidelines that "reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

There can be no question that the Sentencing Commission carried out the mandate given it by Congress in 28 U.S.C. § 994(n) by the promulgation of U.S.S.G. § 5K1.1. The initial version of the guideline stated

> Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the Court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that

may include. but not limited to, consideration of the following conduct:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness. and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered. or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Though there have been more than 500 amendments to the sentencing guidelines since their effective date of November 1, 1987, this very important and often used provision was only amended once effective November 1, 1989 to delete "made a good faith effort to provide" and insert in lieu thereof "provided". Therefore. in the more than eight years that this guideline provision has been implemented. only one minor amendment was deemed needed to clarify its wording. The phrasing that the "appropriate reduction shall be determined by the Court" has remained without any limiting language for mandatory sentencing.

28 U.S.C. § 994(o) provides the Congressional authorization for the Sentencing Commission to "review and revise. in consideration of comments and data coming to its attention. the guidelines promulgated pursuant to the provisions of this section." It appears clear that both Congress and the U.S. Sentencing Commission feel confident that the present phrasing of § 5K1.1 satisfies the concern of rewarding defendants who provide substantial assistance in the investigation or prosecution of another person. It is noteworthy that the only added element in § 5K1.1 from the mandate of § 994(n) seems to be the requirement of a motion by the government. Otherwise, it appears that the language seems to be virtually verbatim between the two provisions.

It is quite possible that the requirement of a government motion was taken from the statutory provisions of 18 U.S.C. §3553(e). This law was passed in 1984 as part of the Omnibus Crime Bill and states:

> (e) Limited authority to impose a sentence below a statutory minimum ---- Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Therefore. both 18 U.S.C. § 3553(e) and 28 U.S.C§ 994(n) are passed by Congress on October 12. 1984 and should be read in conjunction with each other. especially given the similarity in language and purpose. § 3553(e) even specifically cites 28 U.S.C.§ 994. These statutes must be considered as embodying a clear Congressional intent to reward cooperation by defendants.

The United States Sentencing Commission sought to implement the will of Congress by the formulation of U.S.S.G. § 5K1.1. The Commission added the requirement of a government motion that was omitted in § 994(n) but included in § 3553(e). The guideline serves as an almost verbatim recitation of the language in the two statutes. The Commentary to § 5K1.1 further makes clear the connection among the various provisions. Application Note 1 of § 5K1.1 cites both §3553(e) and § 994(n) and then explains how "substantial assistance ... may justify a sentence below a statutorily required minimum sentence." Clearly, § 3553(e) must be read in conjunction with § 5K1.1. U.S.S.G. § 1B1.7 reveals that the Commentary that accompanies the guideline serves many functions. It can help interpret the guideline or explain how it is to be applied and can also provide factors considered in promulgating the guideline. This Court has held in Stinson v. United States, 113 S.Ct 1913, 1915 (1993) that the Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it "violates the Constitution or a federal statute, or is consistent with, or a plainly erroneous reading of, that guideline." Stinson states that the commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice. 113 S. Ct. at 1918. The entire provision of U.S.S.G. § 5K1.1 is a policy statement, but this Court has held that "the principle that the Guidelines manual is binding on federal courts applies as well to policy statements." 113 S.Ct. at 1917. See also Williams v. United States, 112 S.Ct. 1112 (1992). A complete reading of § 5K1.1 and its commentary makes clear that § 3553(e) and

§ 994(n) are implemented by this guideline provision. No amendment to this provision has been offered by Congress or the Sentencing Commission to suggest the contrary. Apparently, the legislative branch of government and the Commission are satisfied that the plain language of § 3553(e), § 994(n), and § 5K1.1 have satisfactorily effectuated the intent of Congress.

There is further language in the Federal Sentencing Guidelines that makes clear that § 3553(e) and § 5K1.1 are not separate mechanisms. In addition to Application Note 1 of 5K1.1, the guideline provision also adds further indications of the interplay between the statute and guideline. The background notes to the Commentary to § 5K1.1 explain that the "nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the Court on an individual basis. Latitude is therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above . . ." Can there be any clearer language that the Sentencing Commission intends that ultimate discretion as to the extent of a downward departure should rest with the sentencing court? The background notes of § 5K1.1 continue by noting that reasons for reducing the sentence should be stated pursuant to 18 U.S.C § 3553(c). Obviously, the Commission was acutely aware of the provisions of § 3553. If there was any thought that § 5K1.1 would not also allow for a sentence below the mandatory minimum required by statute, the Commission would have certainly put in such a caveat. Congress could have perceived that federal appellate courts were misinterpreting the provisions of § 3553(e) and § 5K1.1 as early as 1991 in decisions such as United States v. Keene, 933 F.2d 711 (9th Cir. 1991) and United States v. Cheng Ah-Kai, 951 F.2d 490 (2d Cir. 1991). Yet, no effort was made by the legislative body to implement 28 U.S.C. § 994(o) and revise § 5K1.1 to make it clear that sentencing courts could not utilize the provision to sentence below the mandatory statutory term without a government motion pursuant to 18

U.S.C. §3553(e).

Another clear indication of the Sentencing Commission's understanding and intent regarding § 5K1.1's interplay with mandatory sentencing can be found in Application Note 7 of U.S.S.G. § 2D1.1. It states:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense". See § 5K1.1 (Substantial Assistance to Authorities).

The Second Circuit in Cheng Ah-Kai cites this application note in support of its position that § 3553(e) was contemplated when § 5K1.1 was drafted by stating that the "commentary supports the contention that the Sentencing Commission perceives § 5K1.1 as covering departures both from "mandatory (statutory) minimum" sentences and from the guidelines." 951 F.2d at 493. This court in Stinson suggested a presumption "that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the commission deems that the guidelines should be applied to be consistent with the guidelines manual as a whole as well as the authorizing statute." 113 S. Ct. at 1919.

The majority of the federal appellate courts that have

reviewed this precise issue agrees with the position of the petitioner, Juan Melendez. The Second, Fifth, Seventh, and Ninth Circuits have all explicitly held that a government motion pursuant to §5K1.1 allows the sentencing court to impose a sentence below the statutory mandatory minimum. Prior to the Third Circuit opinion in the instant matter, only the Eighth Circuit had found that a separate motion pursuant to 18 U.S.C. § 3553 was needed to avoid a statutory minimum sentence.

The Ninth Circuit was the first appellate court to directly confront this issue in United States v. Keene, 933 F.2d 711 (9th Cir. 1991). The defendant had pled to a cocaine amount mandating a minimum sentence of ten years under the applicable drug statute in Title 21. The government moved for a downward departure from the guidelines based on the defendant's cooperation in the conviction of several codefendants. However, the prosecution sought to clarify during the sentencing hearing that the government's motion was pursuant to § 5K1.1 and not § 3553(e). This was substantially the same scenario as in the instant matter. However, the Ninth Circuit, unlike the Third Circuit, believed that "once the government filed a motion for departure based upon Mr. Keene's substantial assistance, it was within the sentencing court's authority to exercise its discretion in determining the appropriate extent of departure." 933 F. 2d at 715. The Keene Court noted the substantial cross references that exist among § 5K1.1, § 3553(e) and § 994(n) and that all three must be read together. 933 F.2d at 714. It seemed very clear to the Ninth Circuit that 5K1.1 implements the directive of 994(n) and 3553(e). Later that same year the Second Circuit relied substantially on the Keene holding in United States v. Cheng Ah-Kai, 951 F.2d 490 (2d Cir. 1991) to also find that the sentencing court has discretion to depart below the statutory minimum sentence once the government files a § 5K1.1 motion.

The procedural history of both cases was similar. The

government took the position that the District Court had no discretion to impose a sentence below the statutory minimum without the motion pursuant to 18 U.S.C. § 3553(e). The Second Circuit engages in a thorough analysis of the applicable legal provisions by reviewing the language of the Commentary in U.S.S.G. § 2D1.1 and § 5K1.1. Application note 7 of § 2D1.1 was found to support "the contention that the Sentencing Commission perceives § 5K1.1 as covering departures both from 'mandatory (statutory) minimum' sentences and from the guidelines." 951 F.2d at 493. Application Note 1 of § 5K1.1 signified to the Court "that § 3553(e) was contemplated when § 5K1.1 was drafted and leads to the conclusion that the Sentencing Commission intended that § 5K1.1 serve as a conduit for the application of § 3553(e)." 951 F.2d at 493.

However. the Eighth Circuit had a contrary view of this issue in United States v. Rodriguez-Morales, 958 F.2d 1441 (8th Cir. 1992). The defendant had faced a guideline range of 235-295 months in prison based on a large quantity of cocaine base. The government filed a motion pursuant to § 5K1.1 based on the defendant's substantial assistance against another individual. However. the government stressed that its motion "in no way alters or affects the mandatory minimum sentence applicable in this case" of 120 months. Id. at 1442. But the District Court felt otherwise and sentenced the defendant to 36 months imprisonment by relying on United States v. Keene, 933 F.2d 711 (9th Cir. 1991). The Eighth Circuit reversed that judgment and explained that "section 5K1.1 by its plain terms makes no mention of departures below mandatory minimums-only departure from the Guidelines range." Id. at 1444. The Court further reasoned that the commentary to § 5K1.1 also did not "explicitly state that a motion under the guideline authorizes departures below the statutory minimum." Id. at 1444. Such an extremely narrow reading of § 5K1.1 may be technically correct. but obviously fails to accept the clear intent of the language when read in the context of the enabling legislation

of 28 U.S.C. § 994(n). Such interpretation also clearly ignores the explicit language of application note 7 of U.S.S.G. § 2D1.1. The majority fails to even mention such commentary, which clearly indicates the intent of the Sentencing Commission to utilize § 5K1.1 to "waive" and not impose a statutory minimum sentence.

Far more persuasive is the reasoning of Judge Heaney in the Rodriguez-Morales dissent. Judge Heaney engages in a very thorough analysis of all the pertinent statutes. guidelines. and commentaries. Such analysis is instructive. It reviews the application note 1 of § 5K1.1 and focuses on the phrase "circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." It reasons that such circumstances "can only be a government motion for substantial assistance. Thus. the commentary informs courts that a § 5K1.1 motion . . . permits a court to depart below the mandatory minimum sentence. Any other reading renders the application note mere surplusage." 958 F.2d at 1448. Judge Heaney also took significance from the fact that the application note was not simply in a section labeled background. He believed that application notes helped define terms and explain how the guideline should be applied, while background was general and oriented toward the rationale behind the guideline. Id. at 1448. Finally, the dissent suggests that the explicit language of application note 7 of § 2D1.1 makes sense because most mandatory sentences involve drug cases. It states that given "the irrelevance of mandatory minimums for most crimes, it is not surprising that the Commission did not mention the availability of a departure below a mandatory minimum in the body of section 5K1.1" but rather "in the application notes accompanying section 5K1.1 and in the section where mandatory minimum sentences are most important (section 2D1.1)." 958 F.2d at 1449-1450. A recent opinion interpreting this Court's holding in Stinson stated that when "a court ventures to determine whether the Commission's commentary tracks the guidelines, the degree of deference is at its zenith. United States v. Labonte, No. 95-1538, (1st Cir.

December 6, 1995), slip op. at 12.

Subsequently, decisions were written in the Fifth and Seventh Circuits that refused to follow the view of the Eighth Circuit and joined the rationale of the Ninth and Second. In United States v. Beckett, 996 F.2d 70 (5th Cir. 1993) and United States v. Wills, 35 F.3d 1192 (7th Cir. 1994) the Courts found that § 5K1.1 effectively implemented the dictates of § 3553(e) and § 994(n). The scenario in the Beckett case differs somewhat from the facts of the other precedents because the defendant was facing sentencing on a gun charge pursuant to 18 U.S.C. § 924(c) carrying a mandatory five year term of imprisonment and on a cocaine charge without a mandatory requirement by statute. The government filed a § 5K1.1 motion, but explicitly advised the District Court in an amended motion that the government was not moving pursuant to § 3553(e).

Therefore, the government maintained that the Court had no power to impose any sentence on the gun charge other than five years. The District Court agreed and imposed a five year term on the gun charge. The Court granted the § 5K1.1 motion for the drug charge and imposed a consecutive sentence of 20 months imprisonment which departed from the applicable range of 33-41 months. The Fifth Circuit disagreed and found that the § 5K1.1 motion gave the Court discretion regarding the gun charge also. The Court stated it found the analysis of the Cheng Ah-Kai and Keene decisions more persuasive than that of Rodriguez-Morales. 996 F.2d at 74. It considered the applicable statutes and guidelines and stated:

> . . . there is a direct statutory relationship between § 5K1.1 and § 3553(e) of such a character as to make § 5K1.1 the appropriate vehicle by which § 3553(e) may be

> implemented . . .
>
> the government is clearly authorized to determine whether a defendant's cooperation amounts to substantial assistance . . . However, once the motion is filed, the judge has the authority to make a downward departure from any or all counts, without regard to any statutorily mandated minimum sentence.

996 F.2d at 74-75.

The Seventh Circuit in Wills found that the District Court correctly interpreted Congressional intent in § 994(n) being implemented by § 5K1.1. The Court believed that the decision by the Sentencing Commission to make no distinction between downward departures below the guideline range and the mandatory minimum was a "reasonable interpretation of congressional intent, and therefore one to which we owe deference because the Sentencing Commission has been charged by Congress with administration of the statute." 35 F.3d at 1195-1196. The Court looked to the applicable provisions and concluded that they "place on the shoulders of the district court the responsibility to determine the extent of the departure." 35 F.3d at 1196. But the dissent in Wills also offers some valuable insight into the weakness of the government position. The dissent gives the following rationale:

> Section 3553(e) and Guideline 5K1.1 permit a prosecutor to offer a reward for assistance. This process works best if the amount of the reward can be

> graduated to the value of the assistance-a value the prosecutor (who sees the full menu of crimes and potential cases in the district) can assess better than a judge. By holding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate, the majority curtails the prosecutor's ability to match the reward to the assistance.

35 F.3d at 1198. Such logic flies in the face of reality and the traditional roles performed by prosecutors and judges. A judge is the neutral participant in the criminal justice process, who can dispassionately assess the merits portrayed in the adversarial system. It is actually the judge who can best assess the appropriate reward to be given a defendant who cooperates. There is no vested interest at stake for the judge. No undue pressures are brought to bear upon the role of the judge in the sentencing process. The prosecutor may perceive certain pressures from victims, society, or superiors to obtain a certain period of incarceration for a defendant. Of course, the prosecutor retains the power under § 5K1.1 to determine whether "substantial assistance" was given. But the extent of departure should remain within the traditional powers of the Court. The other argument offered by the dissent is equally unavailing. The concern is raised that there will be fewer § 5K1.1 motions filed if the majority in Wills is followed. Such consequence is unlikely to happen. Prosecutors need cooperation. Any perception by the criminal defense bar or by defendants that the government is exercising its power under § 5K1.1 in an arbitrary fashion could have a chilling effect on efforts of cooperation.

The majority of the Court below in United States v.

Melendez, 55 F.3d 130 (3d Cir. 1995) relies significantly on the dissent in Wills for its rationale. The Third Circuit cites the policy considerations mentioned in the Wills dissent such as the prosecutor being better able to assess the value of cooperation and fear of fewer such motions. 55 F.3d at 135. Such concerns, as noted above, are not based in the reality of the criminal justice system. The Melendez Court also relied on the text of 28 U.S.C. § 994(n) to maintain that Congress did not use that statute to take back the exclusive powers of the prosecutor vested in § 3553(e). 55 F.3d at 134. But such argument also fails because the Court disregards the fact that these statutes must be considered jointly because both were enacted by Congress in October 1984 and § 3553(e) cross-references § 994. Obviously, Congress considered these statutes in conjunction with each other. U.S.S.G. § 5K1.1 is the manifestation of the Congressional mandate. Also, the Melendez majority fails to even mention the application note 7 of § 2D1.1 which makes the Sentencing Commission intent clear. The well-reasoned dissent in Melendez considers the legislation as a whole and also addresses the policy considerations. Judge Huyett reviews application note 1 of § 5K1.1 and states that "this note expresses the Sentencing Commission's intent that § 5K1.1 serve as a 'conduit' for the application of § 3553(e)." Id. at 137. He also believes that application note 7 of § 2D1.1 is illustrative because the "reference to § 5K1.1 rather than to § 3553(e) illustrates the Commission's determination that departures from the statutory minimum sentence are a mere subset of departure from the guidelines." Id at 137. The total discretion in the hands of the prosecutor raises the policy concerns of sentencing disparity given no appellate review and the usurpation of the Court's discretion. Id. at 137.

There are other case precedents that offer some insight into the instant issue. Though the Fourth Circuit did not have this exact issue before it because the government never filed any cooperation motion, United States v. Wade, 936 F.2d 169 (4th Cir. 1991), affirmed on other grounds, 504 U.S. 181

(1992), it offered its view of the power of a § 5K1.1 motion:

> Section 5K1.1 governs all departures from Guidelines Sentencing for substantial assistance, and its scope includes departure from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e) . . .
>
> Once a motion by the government is filed, the Court must exercise discretion in determining the appropriate level of departure, which may, when justified by the facts, be more or less than that recommended by the government.

936 F.2d at 171. Such definitive language seems to leave little doubt as to how the Fourth Circuit would rule on the instant matter. The respective roles of the prosecutor and judge in the § 5K1.1 context have been explained by many courts. In United States v. Pippin, 903 F.2d 1478, 1485-86 (11th Cir. 1990) the Court held that the government cannot limit the power of a § 5K1.1 motion only for the fine portion of a sentence and not the length of jail by explaining that once "it has made a § 5K1.1 motion the government has no control over whether and to what extent the District Court departs" from the guidelines except for reasonableness. See also United States v. Udo, 963 F.2d 1318 (9th Cir. 1992). The Third Circuit had even previously affirmed a departure below the government recommendation in United States v. Spiropoulos, 976 F.2d 155, 163 (3d Cir. 1992) under the

rationale that "having set the section 5K1.1 downward departure process in motion, the government cannot dictate the extent to which the court will depart."

Possibly the most articulate and succinct argument that can be made on behalf of Mr. Melendez is contained in a concurring opinion of the same Third Circuit in United States v. Tannis, 942 F.2d 196 (3d Cir. 1991). The Tannis case involved a young woman who was convicted of a cocaine base offense that required a ten year term of imprisonment and no cooperation motion was filed by the government. Though such facts are obviously different from those of Mr. Melendez, the words of concurrence by Judge Higginbotham seem applicable here. He cautioned that when "we remove all discretion from trial judges and preclude them from making individual determinations . . . it is doubtful whether society benefits on either a long term or short term basis." Id. at 198. The concurrence concludes with the following paragraph that suggests general frustration with mandatory sentencing, but also speaks volume about how the system should work:

> Judges and legislators must always remember that ultimately we are not sentencing widgets or robots, but human beings. I am not suggesting that human frailties and crimes should be ignored. Nevertheless convicted defendants should be sentenced within the spectrum of what most able judges would consider fair and reasonable both for our society and for the sentenced defendant.

942 F.2d at 199. Such view may seemingly have no relevance regarding the instant petition. But the concept of ultimate Court discretion in sentencing is important. Of course, the instant appeal is not challenging the power of Congress to mandate a minimum sentence in certain crimes. See Chapman v. United States, 500 U.S. 453, 467 (1991). It also does not question the exclusive powers of the government to file the appropriate cooperation motion. The appeal simply questions the unbridled power vested in the government to determine the appropriate sentence, even when it acknowledges to the Court that a defendant provided substantial assistance. Congress did not intend such power to be transferred to the Executive branch.

There can be no question that the Third Circuit misinterpreted the Congressional intent of the applicable legal provisions in the instant matter. The majority of the Circuit Courts that have analyzed the provisions have sided with the view of Mr. Melendez. Obviously, the lack of action on the part of Congress or the Sentencing Commission to try to clarify § 5K1.1 on this point makes it clear that such provision does implement the Congressional intent of § 3553(e) and § 994(n).

IV. CONCLUSION

Therefore, it is respectfully requested that the judgment of the Third Circuit Court of Appeals in the instant matter be vacated and the case be remanded for resentencing with directions that the District Court be authorized to consider the imposition of a sentence below the mandatory minimum term set by statute.

CHESTER M. KELLER
Counsel for Amicus Curiae
Association of Criminal Defense
Lawyers in New Jersey

No. 95-5661

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:

BARBARA E. BERGMAN
University of New Mexico
School of Law
1117 Stanford NE
Albuquerque, N.M. 87131
(505) 277-2146

ALAN I. HOROWITZ
Counsel of Record
JAMES R. LOVELACE
MILLER & CHEVALIER,
Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

Balmar Legal Publishing Services, Washington, D.C. (202)682-9800

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INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership consists of more than 8,000 lawyers and more than 28,000 affiliate members, including citizens of every state. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

The NACDL is dedicated to the preservation and improvement of our adversary system of justice. Among the NACDL's stated objectives are the promotion of the proper administration of criminal justice, the protection of individual rights, and the

improvement of the criminal law, its practices, and its procedures.

The NACDL has appeared as amicus curiae in many cases addressing issues arising out of the federal sentencing scheme. It believes that the issue presented here is of great significance to the criminal justice system because the decision below improperly confers upon prosecutors excessive authority to limit a court's discretion in sentencing defendants who may be entitled to a reduced sentence because they have provided substantial assistance to an investigation. NACDL believes that the Court will benefit from its views on this important issue.

Both petitioner and respondent have consented to the filing of this brief, and letters reflecting those consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

A. Congress directed the Sentencing Commission in 28 U.S.C. § 994(n) to take account in its guidelines of the appropriateness of reducing otherwise applicable minimum sentences to reflect a defendant's substantial assistance in the investigation of another person. The Commission implemented this directive in section 5K1.1 by making a substantive determination to allow departures from *guideline* minimum sentences according to the same standard set forth in 18 U.S.C. § 3553(e) for departures from *statutory* minimum sentences.

The effect of the Commission's determination was to unify the treatment of departures from both statutory and guideline minimum sentences under the umbrella of section 5K1.1. When the government files a motion certifying that the defendant has provided substantial assistance, it has met the substantive standard authorizing departure from both kinds of minimums. In that situation, it is both illogical and inconsistent with the Commission's substantive judgment to permit departures from only one kind of minimum sentence but not the other. There is no justification in the text of the relevant statutory and guideline provisions for the court of appeals' contrary holding that there exist distinct procedural tracks for substantial assistance departures from each kind of minimum sentence, thereby allowing the prosecutor to prevent the district court from departing from a statutory minimum even as the government files a motion certifying to the defendant's substantial assistance.

B. Congress did not design section 3553(e) as a stand-alone provision that would govern substantial assistance departures from statutory minimum sentences, without regard to the general framework established by the Sentencing Commission. Section 3553(e) expressly provides that sentences departing from statutory minimums "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." And 28 U.S.C. § 994(n), which was enacted contemporaneously with section 3553(e), directs the Sentencing Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence . . . than that established by statute as a minimum sentence." Thus, it was clearly within the Sentencing Commission's power to create a system in which a government substantial assistance motion authorizes departures from both kinds of minimum sentences. The only question presented here is whether the Commission did so or whether instead it determined to exclude departures from statutory minimums from the guidelines framework.

C. The relevant materials leave no doubt that the Commission intended that section 5K1.1 would serve as the framework for departures from both kinds of minimum sentences. The Commission's own commentary, which is "authoritative" (*Stinson v. United States*, 113 S. Ct. 1913, 1915 (1993)) and the "legal equivalent of a policy statement" (USSG § 1B1.7), makes that clear. Application Note 1 to section 5K1.1 itself refers to statutory minimums and would be meaningless if that section had no application to such minimums; moreover, the Commission elsewhere refers to section 5K1.1 as the source of authority for departures from statutory minimums. USSG § 2D1.1, Application Note 7.

Even apart from the commentary, it is irrational to construe the Commission's actions as leaving outside the guidelines an

independent procedural route for departures from statutory minimums. In addition to being needlessly duplicative, that approach would flout Congress's specific directive in section 994(n) that the *guidelines* should "reflect the general appropriateness of imposing . . . a sentence that is lower than that established by statute as a minimum sentence" when a defendant substantially assists in an investigation.

Contrary to the court of appeals' finding, it is inconceivable that the Commission made a deliberate "policy decision" (Pet. App. 8) to preserve two different procedural tracks because it wanted to give prosecutors the power to control the scope of the court's authority to depart from minimum sentences. The rule set forth in section 5K1.1 for determining the "appropriate reduction," once the government has filed a substantial assistance motion, demonstrates that the Commission had the opposite view. That rule accords maximum discretion to the district court to determine the reduced sentence — with no constraints imposed by the Commission and with the government's role explicitly limited to an advisory one in providing its evaluation of the level of assistance rendered. If the Commission had wanted to give the prosecutor some control over the extent of the reduction, section 994(n) gave it leeway to do so in a more direct and sensible fashion than the crude and haphazard mechanism of denying any authority to depart from one kind of minimum sentence. Thus, it is apparent that the Commission did not intend to give the prosecutor this power.

The decision below is not supported by the text of section 5K1.1. Although the first sentence of the policy statement uses the term "guidelines" without expressly referring to statutory minimums, that is understandable because the substantive policy judgment contained there was novel only for guideline sentences; the Commission was not altering the substantive standard for statutory minimums already found in section 3553(e). In any event, the term "guideline" is commonly read broadly to encompass statutory minimums as well. Otherwise, statutory minimums would be excluded from the scope of certain provisions that are plainly designed for universal application, such as the appropriate reduction factors in section 5K1.1 and the section 3553(c) requirement of a statement of reasons for sentencing below the minimum.

ARGUMENT

A GOVERNMENT MOTION FOR REDUCTION OF SENTENCE BASED UPON THE DEFENDANT'S SUBSTANTIAL ASSISTANCE IN A CRIMINAL INVESTIGATION AUTHORIZES THE SENTENCING COURT TO DEPART FROM BOTH THE SENTENCING GUIDELINES AND AN OTHERWISE APPLICABLE STATUTORY MINIMUM SENTENCE

A. Background

Congress fundamentally changed the federal sentencing system with the enactment of the Sentencing Reform Act of 1984. The new law established the Sentencing Commission to place limits on the district court's broad sentencing authority by developing a system of sentencing ranges keyed to individual conduct. The duties of the Commission were set forth in 28 U.S.C. § 994 and included the promulgation of both sentencing "guidelines" for district courts to follow in imposing individual sentences and "policy statements regarding application of the guidelines or any other aspect of sentencing." *Id.* § 994(a)(1), (2). These guidelines and policy statements are "binding on federal courts." *Stinson v. United States*, 113 S. Ct. 1913, 1917 (1993). The Act also set forth rules governing the district court's role in sentencing in 18 U.S.C. § 3553, including the requirements that all sentences adhere "to the sentencing range . . . set forth in the guidelines" unless there exist aggravating or mitigating circumstances not considered by the Commission in establishing those guidelines and that the district court provide a statement of reasons for imposing a particular sentence. *Id.* § 3553(b), (c). The effective date of section 3553 was postponed for three years, allowing time for the Commission to promulgate sentencing guidelines. *See* Pub. L. No. 98-473, § 235(a)(1), 98 Stat. 2031 (1984), as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728 (1985).

In 1986, Congress amended these complementary sections to permit and encourage the imposition of a lower sentence when a defendant assists the government in investigating or prosecuting other persons. In section 994(n), Congress directed the Commission to take responsibility for establishing a general framework for accomplishing that objective. That statute provides:

> The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Congress similarly amended the rules directly applicable to district courts by adding section 3553(e), which provides:

> *Limited authority to impose a sentence below a statutory minimum*. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

These two sections are closely related in several ways: they both incorporate the same standard for sentence reduction — namely, "a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"; they both specifically authorize the reduction of statutory minimum sentences in that event; and they both explicitly contemplate that the district court will be bound by the guidelines in imposing such a reduced sentence. The difference is

that section 3553(e) limits a court's ability to depart from statutory minimum sentences, and hence the Sentencing Commission's discretion to permit such departures, by specifying that the court's authority must be triggered by a "motion of the Government." By contrast, section 994(n) allows the Commission to authorize departures from the guidelines even in the absence of a government motion.

The Commission implemented the directive of section 994(n) by issuing Policy Statement 5K1.1. Rather than differentiate between the two kinds of minimum sentences, the Commission decided to extend to departures from guideline ranges the government motion requirement contained in section 3553(e). The first sentence of the policy statement describes the departure rule for guideline ranges in language almost identical to that used in section 3553(e) for statutory minimum sentences: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." USSG § 5K1.1.[1] The Commission's policy statement then proceeds to list various factors to guide the district court in determining what is an appropriate sentencing reduction in a particular case, including "the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered." USSG § 5K1.1(a)(1). Neither section 5K1.1 nor section 3553(e) purports to describe any particular procedure to be followed by the government in filing a substantial assistance motion.

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[1] The policy statement was first issued in 1987 and was amended to its current form in 1989 "to clarify the Commission's intent that departures . . . be based upon the provision of substantial assistance," rather than merely "a willingness to provide such assistance." United States Sentencing Commission, *Guidelines Manual*, Appendix C, Amendment 290 (1994).

B. The Sentencing Commission Is Empowered to Authorize Courts to Impose Sentences Below the Statutory Minimum When the Government Files a Motion Attesting That the Defendant Rendered Substantial Assistance in the Investigation of Another Person

The court of appeals ruled that these closely related provisions should be construed as establishing two completely distinct tracks for authorizing courts to impose reduced sentences because of substantial assistance. According to the court below, a district court can impose a sentence lower than the statutory minimum only if the government has filed a motion under section 3553(e) requesting a departure from the statutory minimum; by the same token, a court presumably can invoke substantial assistance to impose a sentence below the bottom of the guideline range only if the government files a motion under section 5K1.1 explicitly requesting a departure from the guidelines on that basis. Pet. App. 10. Thus, the court held that only if the government files two separate motions attesting to substantial assistance (or, perhaps, a single motion explicitly requesting departure from both the guideline and statutory minimum sentences) is the district court authorized to depart from minimum sentence constraints and determine the "appropriate reduction" as directed by section 5K1.1(a).

The court's restrictive reading of the circumstances that permit sentence reductions for substantial assistance is not based on a perceived statutory prohibition or a determination of Congressional intent. That is, the court of appeals did not suggest that section 3553(e) imposes a procedural requirement of a government motion *under that section* that overrides any action taken by the Commission. To the contrary, the court below expressly accepted arguendo petitioner's contention that "Congress in § 994(n) authorized the Commission to take back the access key granted to the prosecutor in § 3553(e)." Pet. App. 8. The only other court of appeals to agree with the decision below similarly has acknowledged that "[t]he statutes plainly empower the Sentencing Commission to provide for departures below the

statutory minimum." *United States v. Rodriguez-Morales*, 958 F.2d 1441, 1444 (8th Cir.), *cert. denied*, 113 S. Ct. 375 (1992).

Indeed, the government does not dispute this point. In its brief in opposition (at 6), the government recognizes that the Sentencing Commission has the power to resolve the question presented here in favor of either party, noting that the "Commission has authority to promulgate guidelines that address the proper response by a court when the government moves for departure below an applicable sentence based on substantial assistance." As the government explains, the relevant statutes show that the Commission's authority extends to cases where the applicable sentence is a statutory minimum. In particular, section 994(n) specifically directs the Commission to "assure the general appropriateness of imposing . . . a sentence that is lower than that established by statute as a minimum sentence."

Moreover, the interrelationship of those statutes makes clear that Congress did not design section 3553(e) to stand alone as a provision that provides an independent track for allowing departures from minimum sentences without regard to the framework set up by the Commission. Section 3553(e) was enacted contemporaneously with section 994(n) — indeed, side-by-side in the same statute. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1007, 1008, 100 Stat. 3207, 3207-7 to 3207-8 (1986). Thus, the statement in section 3553(e) that reduced sentences under that section must be "imposed in accordance with the guidelines and policy statements" was made in conjunction with Congress's directive to the Commission in section 994(n) to provide in the guidelines for reductions of statutory minimum sentences based on substantial assistance. As its title reflects, section 3553(e) was enacted as a limitation on the court's ability to reduce a statutory minimum sentence, not as a procedural mechanism governing such a reduction that would inevitably operate independent of the Sentencing Guidelines. *See United States v. Beckett*, 996 F.2d 70, 75 (5th Cir. 1993) (nothing in the relevant statutes suggests "that Congress intended to permit the government to limit the scope of the court's sentencing authority by choosing to

package its substantial assistance representation in a 5K1.1 motion rather than a 3553(e) motion").

Thus, it is undisputed that the outcome of this case turns on what the *Sentencing Commission* did in implementing the Congressional directive contained in section 994(n). The court of appeals below ruled for the government because it held that section 5K1.1 "represent[s] an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e)." Pet. App. 8. The court thus concluded that the Commission deliberately established a system requiring separate motions for departures from applicable guideline and statutory minimum sentences, respectively. This conclusion is erroneous. As most courts of appeals to consider this issue have correctly held, nothing in the text of the Commission's pronouncements compels that conclusion, and all available evidence indicates that the Commission did *not* intend to establish such a redundant procedure.

C. The Sentencing Commission's Implementation of Congress's Directive to Take Account of a Defendant's Substantial Assistance Established a Framework Under Which a Government Motion Attesting to Such Assistance Authorizes the Court to Depart from Both the Sentencing Guidelines and an Otherwise Applicable Statutory Minimum Sentence

In section 994(n), Congress directed the Sentencing Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence." In so doing, it gave the Commission the leeway to differentiate between the two types of applicable minimums — guideline and statutory minimums. Section 3553(e) limited the Commission's discretion in the case of statutory minimums by providing that a court can depart from them only upon motion of the government reflecting the defendant's "substantial assistance," while section 994(n)

contained no similar limitation and thus did not restrict the Commission in that manner in dealing with departures from guideline minimums.

The Commission, however, made an "advertent decision" (*cf.* Pet. App. 8) not to differentiate between statutory minimums and guideline minimums with respect to the circumstances under which departures based on substantial assistance would be permitted. Section 5K1.1 provides that the district court's authority to depart from a guideline minimum is triggered by the same prerequisite contained in section 3553(e) for statutory minimums — namely, a government motion attesting to the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." Thus, in establishing a guidelines framework that would "reflect the appropriateness of" imposing lower sentences when a defendant has rendered substantial assistance, the Commission decided to *unify* the treatment of statutory and guideline minimums.

Section 5K1.1 therefore is most logically viewed as applying comprehensively to all substantial assistance departures. Four of the five circuits that previously considered the issue presented here have so concluded, ruling that section 5K1.1 encompasses substantial assistance departures from statutory minimums. *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991); *see also Wade v. United States*, 936 F.2d 169, 171 (4th Cir. 1991) (dicta), *aff'd on another issue*, 504 U.S. 181 (1992); *but see United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir.), *cert. denied*, 113 S. Ct. 375 (1992). For the reasons explained in more detail below, this Court should similarly conclude that the Commission established a framework under which a government substantial assistance motion authorizes the district court to depart from both kinds of minimum sentences.

1. The Commission's Own Explanatory Commentary Demonstrates that in Section 5K1.1 the Commission Intended to Establish Identical and Unified Treatment of Substantial Assistance Departures from Both Kinds of Minimum Sentences

It is beyond dispute that the Commission intended that departures from both kinds of minimum sentences would be governed under the umbrella of the guidelines and that the Commission believed it had accomplished that goal in section 5K1.1. The commentary to section 5K1.1 explicitly refers to section 3553(e) and explains the policy statement as describing a rule that governs both kinds of minimum sentences:

> Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

USSG § 5K1.1, Application Note 1.

This application note reflects the Commission's view that section 5K1.1 implements both of the referenced statutes by using the same standard as a prerequisite for a court to depart from both kinds of minimum sentences — namely, a government motion attesting to substantial assistance. As Judge Heaney stated in rejecting the position adopted by the court below, "the commentary informs courts that a 5K1.1 motion for substantial assistance permits a court to depart below the mandatory minimum sentence"; otherwise, it would serve no purpose. *Rodriguez-Morales*, 958 F.2d at 1448 (Heaney, J., dissenting). It shows that "the Sentencing Commission intended that § 5K1.1 serve as a conduit for the application of § 3553(e)." *Cheng Ah-Kai*, 951 F.2d at 493; *see also Wills*, 35 F.3d at 1196; *Beckett*, 996 F.2d at 74, 75 (section 5K1.1 is the appropriate "vehicle" or "tool by which § 3553(e) may be implemented"); *Keene*, 933 F.2d at 714-15.

The Commission's understanding that it unified treatment of both kinds of minimum sentences when it promulgated section 5K1.1 is also reflected elsewhere in the guidelines. Section 2D1.1 is a lengthy guideline addressed to a variety of drug offenses, which are the crimes to which most statutory minimums attach. *See Rodriguez-Morales*, 958 F.2d at 1449 (Heaney, J., dissenting). The commentary to that guideline states as follows:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* § 5K1.1 (Substantial Assistance to Authorities).

USSG § 2D1.1, Application Note 7. Thus, the Commission in its commentary has repeatedly listed section 5K1.1 as the authority for a court's ability to depart below a statutory minimum sentence. *See Cheng Ah-Kai*, 951 F.2d at 493; *Rodriguez-Morales*, 958 F.2d at 1449 (Heaney, J., dissenting).

These commentaries are prepared by the Commission itself and therefore are entitled to great weight in interpreting the Commission's policy statements and guidelines. As this Court observed in *Stinson*, 113 S. Ct. at 1918, the "commentary explains the guidelines and provides concrete guidance as to how [they] are to be applied in practice." Thus, the Eighth Circuit erred in dismissing the commentary (pre-*Stinson*) as merely "an academic observation" that provides no guidance in interpreting section 5K1.1. *See Rodriguez-Morales*, 958 F.2d at 1444. The guidelines themselves provide that commentary addressing the appropriate circumstances for departing from the guidelines "is to be treated as the legal equivalent of a policy statement." USSG § 1B1.7. And this Court has held that "commentary in the Guidelines Manual that interprets or explains a

guideline is authoritative" unless it is a "plainly erroneous reading" of the guideline or it contradicts a higher authority, such as a statute or the Constitution. *Stinson*, 113 S. Ct. at 1915.

Accordingly, it is untenable for the court of appeals to conclude that the Commission made an "advertent decision" to "leav[e] departures below statutory minima to the authority conferred by § 3553(e)" and "to provide authority in the Guidelines only for departures below the Guideline range." Pet. App. 8. To the contrary, the Commission's own words reveal its intent that all departures based on substantial assistance should fall under the umbrella of the guidelines, and it did not preserve section 3553(e) as an independent, unrelated avenue for departures in the case of statutory minimums.

2. It Is Illogical to Construe the Commission's Promulgation of Section 5K1.1 As Limited to Guideline Ranges While Requiring a Distinct Procedural Avenue for Authorizing Departures from Statutory Minimums

Once the Commission determined to establish the same prerequisite for departures from guideline minimums as that contained in section 3553(e) for statutory minimums, it would have been illogical for the Commission to insist on different procedural avenues for each kind of departure. From an administrative standpoint, such an approach would have been burdensome and pointless since the two motions would be duplicative, consisting of the same attestation from the prosecutor concerning the defendant's substantial assistance.

Moreover, that approach would work at cross purposes with the substantive judgment the Commission made in promulgating section 5K1.1. The Commission decided that, in the substantial assistance context, it would obliterate any distinction between guideline and statutory minimums and establish a rule that would allow departures from guideline minimums in the same circumstances in which Congress had already allowed departures from statutory minimums. That substantive decision to have a single standard for departing from both kinds of

minimums would be undermined by a procedure that opens the door to differential treatment — allowing departures from one kind of minimum sentence when the common standard is satisfied but prohibiting departure from the second kind of minimum sentence.

Contrary to the suggestion of the court below, a system that treats the filing of a single substantial assistance motion as authorizing departures from both kinds of minimum sentences does not take away the "access key" granted to the prosecutor in section 3553(e). *See* Pet. App. 8. The prosecutor still retains the sole power to decide when a defendant's assistance crosses the threshold that warrants a sentence reduction, and the government can prevent any departure from a minimum sentence simply by refusing to file a motion attesting to such substantial assistance. *See Wade v. United States*, 504 U.S. 181, 185 (1992). All the Commission has done is broaden the domain controlled by the prosecutor's "access key." When the government files a motion certifying the defendant's substantial assistance, the Commission has determined that departures will be allowed from guideline minimums as well as from statutory minimums.

Indeed, for the Commission deliberately to create a two motion system by declining to cover departures from statutory minimums would have been unfaithful to the charge given to it by Congress in section 994(n). That statute expressly ordered the Commission to assure that the guidelines "reflect the general appropriateness of imposing . . . a sentence that is lower than that established by statute as a minimum sentence" when a defendant substantially assists in an investigation. *See also Rodriguez-Morales*, 958 F.2d at 1444 & n.2 (acknowledging that section 994(n) not only "plainly empower[s] the Sentencing Commission to provide for departures below the statutory minimum" but also "can be read as mandating" that the Commission so provide); *Wills*, 35 F.3d at 1195. Under the holding of the court below, the Commission flouted this express directive by deliberately excluding from the guidelines any mechanism for

taking substantial assistance into account in departing from minimum sentences.

The facts of this case illustrate how the court's decision undermines section 994(n). It is undisputed that the defendant satisfied the standard set forth by Congress for a reduction from the statutory minimum; the prosecutor filed a motion attesting that the defendant provided "substantial assistance in the investigation or prosecution of another person." Pet. App. 3. In those circumstances, section 994(n) demands that the Commission establish guidelines that will allow a reduction below a statutory minimum sentence. Yet according to the court of appeals the Commission has failed to accommodate that demand, and the district court is bound by that statutory minimum despite the government's certification that the defendant provided substantial assistance.

There is no basis for assuming that the Commission had any interest in disregarding the mandate of section 994(n) or in failing to perform the tasks set forth there. The decision of the court below thus turns ordinary principles of interpretation on their head in construing the Commission's actions in a way that would reflect an intent not to comply with Congress's directive in full. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (agency's "decision is entitled to a presumption of regularity"). Especially in light of the guideline commentary, the court below should more properly have assumed that the Commission sought fully to implement section 994(n), and the court should have interpreted the Commission's actions in accordance with that intent.

3. The Commission Did Not Intend to Confer Upon Prosecutors the Power to Restrict the District Court's Authority to Depart from Otherwise Applicable Minimum Sentences When a Defendant Has Rendered Substantial Assistance

There is only one conceivable reason why the Sentencing Commission might have established a duplicative procedure requiring separate substantial assistance motions for guideline minimums and statutory minimums — that is, if the Commission deliberately decided that it wanted a prosecutor to be able to exercise control over the ultimate sentence by having the option of authorizing a departure from one kind of minimum sentence but not from the other kind of minimum sentence. The court below found that the Commission consciously made that precise judgment, ruling that "§ 5K1.1 reflects a policy decision on the part of the Commission to give the prosecutor a veto power over departures below the Guidelines range based on cooperation." Pet. App. 8. The court cited no authority to justify its finding regarding the Commission's intent, and there is not a shred of evidence to support it. To the contrary, the Commission's statements on the subject of substantial assistance departures strongly indicate that it would not regard conferring this power on prosecutors to be desirable policy.

Section 994(n) gave the Commission broad discretion to delineate the extent to which departures for substantial assistance would be allowed. The Commission could have determined, for example, that substantial assistance motions could yield up to a 50 percent reduction from the otherwise applicable minimum or it could have established new guideline ranges for cooperating defendants — ones that would control departures from both guideline minimums and statutory minimums. And, presumably, the Commission could have given prosecutors some binding authority to limit the permissible degree of departure.

The Commission, however, chose not to impose these kinds of limitations, instead leaving the extent of departure almost entirely to the sound discretion of the district court. Section 5K1.1(a) does provide guidance to the court, containing a non-exclusive list of factors that the court may consider in determining the appropriate reduction. The prosecutor is mentioned in those factors but his role is strictly advisory — one of the factors is "the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered." USSG § 5K1.1(a)(1). The commentary on this portion of the policy statement reemphasizes the court's superior responsibility. The nature and extent of the defendant's assistance "must be evaluated *by the court* on an individual basis," but "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain." *Id.*, Background Commentary and Application Note 3 (emphasis added).

The Commission's decision to grant the district court authority to determine the appropriate sentence reduction accords with the traditional role of the court in the sentencing process. Although all three branches have always played some role in the process that ultimately results in a sentence, the judiciary traditionally has "exclusively" performed the task of "passing sentence on every criminal defendant." *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989). The Sentencing Reform Act imposed some new constraints on the range of the district court's authority, but it did not change the court's ultimate role as the arbiter of the individual sentence.

Moreover, even those additional constraints flow entirely from authority granted by Congress to the Sentencing Commission, not to prosecutors. Here, where the Sentencing Commission decided to forgo the opportunity to issue its own guidelines for reduced sentences, it follows *a fortiori* that it did not intend to give the *prosecutor* the power to exercise control over the appropriate level of reduction. Rather, as the policy statement

expressly states, that is a matter to be "determined by the court." USSG § 5K1.1(a).

Finally, if the Commission had wanted to give the prosecutor some control over the amount of sentence reduction, there is no reason why it should have limited itself to the elliptical method found by the court of appeals. Section 994(n) gave the Commission broad authority "to reflect the general appropriateness" of imposing reduced sentences when the defendant has rendered substantial assistance. Presumably, the Commission could have issued guidelines that gave the prosecutor more input into sentencing, even requiring the court to limit sentence reduction to the amount recommended by the prosecutor. Plainly, the Commission believed that it was inappropriate to give the prosecutor such a direct role, and that is why it limited the government's role to providing an evaluation of the level of assistance for the court to consider. USSG § 5K1.1(a)(1).

Against this background, it is inconceivable that the Commission made a "policy decision" (Pet. App. 8) to give the prosecutor *one* element of control over the amount of sentence reduction in cases of substantial assistance by permitting the prosecutor to authorize the court to reduce a sentence below the guideline minimum while prohibiting the court from going below the statutory minimum. In terms of achieving the supposed policy goal identified by the court of appeals, this element of control is so crude as to be almost worthless. The prosecutor cannot reliably use this tool "'to offer a reward for assistance'" that is "'graduated to the value of the assistance.'" Pet. App. 9, quoting *Wills*, 35 F.3d at 1198 (Easterbrook, J., dissenting). The amount of the "reward" is not within the prosecutor's control; it is a wildly fluctuating number that depends on the haphazard relationship between the statutory minimum and the guideline sentence in a particular case. For example, in this case the guideline minimum was 135 months and the statutory minimum was 120 months, allowing the prosecutor the opportunity to offer as a "reward" exactly a 15-month reduction. *See* Pet. App. 3. By contrast, in the *Keene* case, the only option for the "reward" was a 68-month reduction, even though the assistance

rendered in *Keene* might have been less valuable than that rendered in this case. *See* 933 F.2d at 712.

In sum, it is untenable for several reasons to conclude that the Commission deliberately made a policy decision to require two separate motions as a way of giving the prosecutor control over the extent to which the district court can depart from a minimum sentence because of substantial assistance. The prosecutor has the authority to decide whether to make a substantial assistance motion and to recommend the amount of departure, but "[o]nce that recommendation is made, . . . the extent of [the] departure is discretionary" with the district court. *Wills*, 35 F.3d at 1196-97; *see also Cheng Ah-Kai*, 951 F.2d at 494; *Keene*, 933 F.2d at 714.

4. The Text of Section 5K1.1 Does Not Compel the Conclusion That the Commission Preserved a Separate Avenue for Seeking Reductions of Statutory Minimum Sentences Under Section 3553(e)

Although it reached the same result as the court of appeals below, the Eighth Circuit did not find that the Commission deliberately decided to give prosecutors the option of permitting departures from only one kind of minimum sentence when a defendant has rendered substantial assistance. To the contrary, the Eighth Circuit recognized that it would have been problematic for the Commission to reach such a policy decision in light of Congress's instructions in section 994(n). *See Rodriguez-Morales*, 958 F.2d at 1444 n.2. The Eighth Circuit, however, ruled that the Commission's intent is irrelevant because the text of section 5K1.1 refers only to "guidelines," not statutory minimum sentences. According to the court, "[w]hether the Commission intended to give the prosecution two alternative motions for substantial assistance departures — thus allowing the government to set the parameters of the district court's discretion — section 5K1.1 as drafted has created such a result," leaving the court "no choice but to hold" that "[o]nly a section 3553(e)

motion allows for" departure from a minimum sentence. *Id.* at 1445.

The Eighth Circuit's rationale is as flawed as that of the court below. At the outset, we note that section 5K1.1 is a policy statement, and the Commission's own guidelines establish that commentary concerning departures "is to be treated as the legal equivalent of a policy statement." USSG § 1B1.7. Therefore, the text of section 5K1.1 carries no greater weight than the text of the supporting commentary. Even if the text of the policy statement standing alone did support the decision below, it could not override the Commission's clear message in the relevant commentary that it included statutory minimums under the umbrella of the guidelines.

More generally, the Eighth Circuit is incorrect in concluding that the text of section 5K1.1 standing alone compels acceptance of the government's position. In fact, that text is fully consistent with the proposition that a district court is authorized to depart from both kinds of minimum sentences when the government files a substantial assistance motion. Accordingly, this Court should construe the applicable provisions in accordance with the Commission's manifest intent and should reject the contention that the guidelines make no provision for reduction of statutory minimum sentences where the defendant provides substantial assistance.

a. The courts that have agreed with the government's position have laid undue stress on the use in the first sentence of section 5K1.1 of the term "guidelines." *See* Pet. App. 8; *Rodriguez-Morales*, 958 F.2d at 1444. Even assuming that this term should be read narrowly to exclude statutory minimum sentences, its use is not probative of the issue before this Court. The first sentence of section 5K1.1 is the Commission's substantive policy statement of how it decided to implement Congress's instructions in section 994(n) to allow downward departures from minimum sentences to "take into account a defendant's substantial assistance." In the case of guideline minimums, there was no standard for taking substantial assis-

tance into account until the promulgation of section 5K1.1, and therefore it was necessary for the Commission to address guideline minimums in that sentence.

In the case of statutory minimums, however, section 3553(e) already established the standard adopted by the Commission in the first sentence of section 5K1.1, that is, authorizing departures if the government files a substantial assistance motion. If the Commission had decided to make a rule for statutory minimums that supplemented or differed from the section 3553(e) rule, then it would have been important for the Commission to make clear with an explicit reference that the new rule applied to statutory minimum sentences. But, given the decision the Commission actually made, an explicit reference would have been largely superfluous. If one were to add the phrase "or a statutory minimum sentence" after "guidelines" in section 5K1.1, that amendment would not convey any new information and would not change the substantive rule for departures based on substantial assistance. Therefore, the omission of that phrase should not be accorded great significance.

Clearly, the Commission's failure to include that phrase should not be probative of the issue before this Court, which concerns the *procedure* for authorizing a district court to depart from an otherwise applicable minimum sentence. Neither section 3553(e) nor the first sentence of section 5K1.1 purports to detail a procedure for substantial assistance departures. All they do is establish the substantive requirement that the government file a motion. Where, as here, the government does file a motion attesting to the defendant's substantial assistance, the substantive requirement of both sections is satisfied, and it is fully consistent with the language of both sections for that single motion to authorize departure from both kinds of minimum sentences.

b. In any event, even assuming that for some reason it is necessary that the first sentence of section 5K1.1 encompass statutory minimums, that requirement is met here because the term "guidelines" is frequently given a broad meaning that

encompasses statutory minimums. For most purposes, guideline minimums and statutory minimums are close cousins; there is no sharp distinction between the two. For example, section 5G1.1(b) of the guidelines provides that when the statutory minimum is above the guideline range, "the statutorily required minimum sentence shall be the guideline sentence."[2]

Congress itself has used the term "guidelines" in this broad sense. The original version of section 3553, before the 1986 addition of section 3553(e), made no reference at all to statutory minimums, even though the federal criminal statutes contained minimum sentence provisions. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess. 66 (1984). In listing the factors the district court must consider, the statute refers only to "the sentencing range . . . set forth in the guidelines." 18 U.S.C. § 3553(a)(4). Thus, under the court of appeals' view that "guidelines" and statutory minimums are mutually exclusive, the original section 3553 would not have directed district courts to take account of statutory minimums when sentencing.

A narrow reading of "guidelines" would also lead to similar anomalies and gaps today. If section 5K1.1 does not encompass minimum sentences, then a district court is bound to consider the long list of factors set forth there only when it is departing from the guidelines, but not when it is departing from a statutory minimum. More important, Section 3553(c)(2) requires a court to provide "the specific reason for the imposition of a sentence"

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[2] Indeed, the court of appeals below stated that, in such circumstances, a section 5K1.1 motion does authorize the court to depart from a statutory minimum because a "motion under either § 3553(e) or § 5K1.1 will suffice to demonstrate that the requisite exercise of prosecutorial discretion has occurred." Pet. App. 8 n.1. That concession recognizes that there is nothing talismanic about the form of a government substantial assistance motion; whatever its form, the substance of the motion is a statement by the government that the standard for departing from either kind of minimum sentence has been satisfied. The court's statement is logically incompatible with its position that section 5K1.1 cannot provide authority for departing from a statutory minimum.

outside the guideline range. If "guidelines" do not encompass statutory minimums, that requirement would apply only to substantial assistance departures below the guidelines, but the court would have no obligation to provide a reason for imposing a particular sentence below a statutory minimum. In both of these situations, applying the court of appeals' cramped reading of guidelines would create gaps in the new system of district court accountability for sentencing that clearly were not intended by Congress or the Commission.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:

BARBARA E. BERGMAN
University of New Mexico
School of Law
1117 Stanford NE
Albuquerque, N.M. 87131
(505) 277-2146

ALAN I. HOROWITZ
Counsel of Record
JAMES R. LOVELACE
MILLER & CHEVALIER,
Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

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